93-6360

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

RICHARD WILKINS and ROLAND SMOTHERMAN,

Petitioners,

vs.

SECRETARY OF THE INTERIOR, MANUEL LUJAN, in his official capacity; SUPERINTENDENT OF THE OZARK NATIONAL SCENIC RIVERWAYS, ART SULLIVAN, in his official capacity as National Park Superintendent,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a reviewing court in its review of an informal agency decision made by the National Park Service and the Department of Interior to remove wild horses from the Ozark National Scenic Riverways area must first determine the following to properly review the agency decision and apply the appropriate standard:

(a) If there is an agency decision document;

(b) When the decision was made (whether documented or orally promulgated);

(c) How, procedurally, the agency arrived at its decision; and,

(d) Whether the decision was based on post hoc rationalization, agency bias or bad faith dealing by the agency with those the decision would affect.

2. Whether the National Park Service and the Department of Interior decision-making process has failed when an unsupported and improper view held by the National Park Service of an alleged legal mandate to remove 20 wild horses from the Ozark National Scenic Riverways area precedes and pervades the decision-making process to determine if removal of the wild horses is to be made.

3. Whether the National Park Service and the Department of Interior's decision-making process has failed when they have failed to follow their own regulations interpreting the Ozark National Scenic Riverways Enabling Act[1] which requires

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1. Ozark National Scenic Riverways Enabling Act, Pub.L. No. 88-492, 78 Stat. 608 as amended, 16 U.S.C. § 460m-1.

preservation and conservation of the "unique scenery and other natural values and objects of historic interest", by failing to consider wild horses roaming in the Ozark National Scenic Riverways area as unique scenery, natural components of the park, objects of historical or cultural interest or of recreational value.

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SECRETARY OF THE INTERIOR, MANUEL LUJAN, in his official capacity; SUPERINTENDENT OF THE OZARK NATIONAL SCENIC RIVERWAYS, ART SULLIVAN, in his official capacity as National Park Superintendent,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Richard Wilkins and Roland Smotherman respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eight Circuit is reported as 995 F.2d 850 and is reprinted as Appendix A. The order of the United States District Court, Eastern District of Missouri, Southeastern Division is unpublished and reprinted as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on June 15, 1993. A Petition for Rehearing was denied on July 28, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a 2-1 reversal of a judgment of United States District Court, Eastern District, Southeastern Division (Judge Stephen Limbaugh) by the United States Court of Appeals for the Eighth Circuit, Circuit Judges McMillian and Magill, majority opinion, Circuit Judge Loken dissenting. The District Court had permanently enjoined the National Park Service from removing a band of 20 wild horses from the Ozark National Scenic Riverways. The District Court concluded the Park Service had made a clear error in judgment wherein the Park Service sought to remove the horses based on an unfounded conclusion that the Park Service was "mandated" by law to remove the horses. Additionally, the court found the Park Service had failed to give any consideration to the proposition submitted to the Park Service by the Petitioners that the horses were part of the "unique scenery" of the Ozark National Scenic Riverways or a "cultural" or "historical" resource of the Ozark National Scenic Riverways.

The Eighth Circuit Court of Appeals majority opinion merely cited that they had reviewed the administrative record and concluded there was sufficient evidence in the record to support the Secretary's decision and that the decision was not arbitrary and capricious. The majority opinion did nothing more. There was no finding that a final agency decision had been reached, when the decision was made, how procedurally the agency arrived at its decision nor whether the decision was based on sound findings produced by good faith research efforts prior to decision.

The Eighth Circuit dissent could not find the "contemporaneous agency explanation to review". Further, the dissent found the decision-making process failed where it could not be determined whether the decision was made based on a mistaken requirement of law or an exercise of discretion by the agency. Additionally, the dissent pointed out the responsibility of the Park Service as set forth in their own management policies to "locate, identify, evaluate, preserve, manage and interpret qualified cultural resources." There was no attempt by the Park Service to consider the horses as a cultural resource, historical resource, recreational resource or part of the unique scenery of the Ozark National Scenic Riverways. These considerations should have been relevant factors in their decision for removal.

B. Statement of Facts

There are approximately 20 free-roaming unbranded, unclaimed, not domesticated horses roaming a 24 mile stretch of the Ozark National Scenic Riverways. Although their origin is unknown, they are believed to be remnants of the "open range" which ended in Missouri in the 1950's.

The existence of the wild horses and their exploits are frequent topics of conversation and a source of lore for the residents. Sightings of the wild horses are rare and considered extraordinary and delightful. Many people come to the area to see the horses.

Residents consider the horses as a part of their cultural and historical heritage. They consider the horses to be part of the unique scenery within the Ozark National Scenic Riverways. The wild horses are considered a recreational resource by area residents and visitors to the area alike.

The Ozark National Scenic Riverways came into existence long after the origin of the wild horse herd. Even after nearly 30 years of operation the Park Service took no action with regard to the horses. Art Sullivan was named Superintendent of the Ozark National Scenic Riverways in 1976. The National Park Service Superintendent mistakenly believed that the Park Service was under a federal legal mandate to remove the horses. The Park Service admittedly knew the removal of the horses would be challenged by the public. In 1985 a study was done in an effort by the Park Service to "make an adequate case for removal". The study found, "the horses to be in good health, showing shiney coats, adequate weight, and well-defined muscles."

However, on May 3, 1990 without further study of the issue, the Park Superintendent, Art Sullivan issued a news release claiming the horses were "ill equipped to contend with harsh winters, disease, injury, food shortages and other environmental factors detrimental to their continued well-being." The Park Service requested bids for their removal.

Thereafter, there was an overwhelming public reaction opposing the removal of the horses. Every legislator in the area both State and Federal protested the removal to the Park Service. The Missouri Legislature passed a joint resolution finding that the horses are a cultural resource and reminder of the open lands that once extended across the Ozarks; and that the horses have become a part of Ozark folklore and objects of local interest; that the horses are a wildlife resource; and that the National Park Service should be responsive to the public opinion of the citizens of the State of

Missouri. The Missouri Humane Society declared that the well-being of the horses did not pose a problem requiring removal.

The Park Service then advised the public that the removal would have to be made in accordance with Missouri law; that the horses constituted livestock running at large. The Park Service advised the public that they felt mandated by that state law to remove the horses. An opinion of the Missouri Attorney General's office negated that perceived mandate.

Still perceiving themselves as under a federal legal mandate to remove the horses, an environmental assessment of the horses was ordered by the Park Service. The environmental assessment was dated only "February, 1991". The Park Service issued its special use permit for the removal of the horses to Co-defendant, Randy Clark on February 6, 1991. A letter from Scott Sewell, acting assistant Secretary of the Interior was sent to Representative Emerson on February 20, 1991. The Park Service now contends that this letter was the final agency decision, and that it was based upon perceived future harm as set forth in the Environmental Assessment. However, the Park Service Regional office did not review the Environmental Assessment until March 20, 1991, a full month after the alleged "final decision" and 1 1/2 months after the special use permit was issued.

Even though the letter from Scott Sewell was couched in terms of removal for environmental reasons, it was not apparent from the foregoing nor at trial that the Park Service relied upon the environmental assessment. Defendant, Art Sullivan's testimony was as follows:

> Q. Had there been a decision made prior to the [1985] study to remove the horses?
>
> A. I don't think there was ever any question

about the decision being made, I think the decision was made for us — under our rules and regulations and under the laws and policies. The management had no leeway that these horses are not a part of the natural ecosystem and, of course, they didn't move. I think the decision is built into the management policies of the National Park System and those in turn emanate from certain pieces of legislation.

Q. So you're saying that although you had not made a specific decision to remove the horses, that it was inevitable because of the rules, regulations, and those things that you had cited before as guidelines for running the National Park Service, Ozark National Scenic Riverways, in particular would mandate you to remove the horses?

A. That's correct.

At trial, the Park Service admitted that the wild horses were not considered nor were they sought to be identified as cultural or historical resources, nor were they considered as a part of the unique scenery in the area. Testimony from numerous citizens in the Ozark National Scenic Riverways area was presented at trial. All such testimony expressed the value of the horses as a part of the unique scenery, natural value, recreational value and objects of cultural and historical interest in the riverways area.

REASONS FOR GRANTING THE WRIT

This Court has set forth in *Citizens to Preserve Overton Park v. Volpe*, 91 S. Ct. 814 (1971) the proper application by a reviewing court of the "arbitrary and capricious" standard of review contained within the Administration Procedure Act, 5 U.S.C. § 706. The case at bar presently suffers from a marked departure from these guidelines.

This Court has set forth a 3-part process to review an informal agency decision. First, there must be substantial inquiry into the facts; a thorough probing, in-depth review. Secondly, the Court must determine if the decision was based upon a consideration of the relevant factors and whether there has been a clear error of judgment. Finally the Court must determine whether the agency's action followed the necessary procedural requirements. *Overton Park, supra,* 823 and 824.

Additionally, a reviewing court must be certain that the agency's rationale is not "after the fact" or "post hoc" rationalization. Such is an inadequate basis for review. If there is no record which explains it's rationale, the court may require some explanation from the decision-makers, themselves. Certainly if there is a showing of bad faith or improper behavior such an inquiry can be made. Even a "*de novo*" review is authorized where issues that were not before the agency are raised in a proceeding to enforce an adjudicatory agency action.

The majority opinion of the United States Court of Appeals for the Eighth Circuit, in our present case is devoid of this accepted and usual course of judicial proceedings.

I.

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT ERRED IN ITS FAILURE TO IDENTIFY DOCUMENTATION AND TIMELINESS OF THE AGENCY DECISION TO BE REVIEWED.

Obviously, for the Court of Appeals or any reviewing court to determine if an agency decision was based on relevant factors, identification of the decision document or at least identification of the point in time in which a decision was made must be determined by the reviewing court. This court has clarified the need for such a determination in *Camp v. Pitts,* 411 U.S. 138, 142-143 (1973). Such a determination is absent in the majority opinion.

In our present case, the final agency decision has been presented to the reviewing court as a 1990 press release (Appendix D, 33a), the testimony of the park superintendent, *supra,* that the Park Service was under a legal mandate to remove the horses, and a letter from Department of the Interior Assistant Secretary Sewell to Congressman Bill Emerson citing environmental reasons for removal from a study that had not yet been reviewed. (Appendix E, 35a) Without the determination of the reviewing court as to the point in time at which a decision has been reached by good faith deliberation on the part of the agency, the reviewing court could not determine if it had an adequate record for review. The record may be inadequate for review due to the "post hoc" rationale of the agency containing the record. The agency could be defending its actions on grounds different from those on which the actions were based. *General Electric Company v. Nuclear Regulatory Commission,* 750 F.2d 1394, 1403-04 (7th Cir. 1984).

Regardless of the failure to identify the timeliness of the agency decision the Court of Appeals majority opinion completely ignored the testimony of the Park Superintendent, Art Sullivan,

that the agency was "mandated" to remove the horses. His testimony was unchanged despite the various reasons espoused by the Park Service at various times to remove the horses. His testimony came after the Sewell letter to Congressman Emerson and reflected his mistaken reading of his own regulations throughout the Park Service's supposed "deliberations". The Park Service decision cannot stand under these circumstances. "Post hoc rationalizations of an agency cannot serve as a sufficient predicate for agency action." *American Textile Manufacturing Institution v. Donovan*, 452 U.S. 490, 539 (1981) citing *Overton Park*, 401 U.S. at 419.

Agency provided scientific evidence of environmental damage caused by the horses would ordinarily be sufficient for a reviewing court to uphold an informal agency decision but here there is no indication of the basis on which the agency exercised its expert discretion.[2] The reviewing court had no way of knowing whether the agency decision was based on an ill-perceived "mandate" or expert discretion. The evidence seems clear as presented at trial that the environmental assessment was not relied upon, its review appearing after the fact.

---

2. "Expert discretion is the lifeblood of the administration's process, but unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 at 167 quoting *New York v. United States*, 342 U.S. 882, 884 (dissenting opinion).

II.

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT ERRED IN ITS FAILURE TO REQUIRE THE DEPARTMENT OF INTERIOR AND THE NATIONAL PARK SERVICE TO FOLLOW THEIR OWN REGULATIONS AND POLICIES.

The National Park Service is mandated by its own regulations to:

> Locate, identify, evaluate, preserve, manage, and interpret qualified cultural resources in every park in such way that they may be handed on to future generations unimpaired . . .
>
> All cultural resources management activities must be undertaken with a knowledge that special tangible resources (structures, sites, *objects,* etc.) are finite and non-renewable. Similarly, intangible cultural traits and behaviors (songs, ceremonies, *traditional uses,* etc.) shall be accurately represented and interpreted.

(*Cultural Resources Management,* NPS-28, Appendix G, 44a) (emphasis added).

In addition, the Natural Park Service must follow its own standards for managing historical or landscape districts as follows:

> Every reasonable effort will be made to use the rural landscape for its historically intended purpose or to provide a compatible use that requires minimal alteration to its

> distinguishing natural and cultural components.

(*Cultural Resources Management NPS-28,* Appendix G, 44a).

Additionally, the Park Service has recognized that the Ozarks has a "rich folk culture" and a "unique heritage". (*General Management Plan/Developmental Concept Plan,* Appendix I, 56a).

The Park Service has recognized that, "cooperation with other federal, state, and local agencies, *private organizations,* and *members of the public* will ensure that land uses in the park vicinity are compatible with long term perpetuation of the riverways natural, cultural, and recreational values." (*General Management Plan/Developmental Concept Plan,* Appendix I, 56a) (emphasis added).

The National Park Service has recognized that "locals" should be utilized in management decisions regarding cultural inventories.

> Socio-cultural inventory — although Ozark Riverways does not have a formal socio-cultural inventory, the Park does have a documented ethnohistoric and ethnographic database on the traditional uses and settlement localities of the Park; with this knowledge in hand, the Park has integrated local people into the Park's staff and their influence is reflected in various resource management decisions.

(*Resources Management Plan,* Appendix H, 52a)

It is readily apparent from the testimony of Art Sullivan and from the letter which at times has been touted as the final decision of the Park Service (Letter from Scott Sewell to Congressman Bill Emerson; Appendix E, 35a) that the horses were never given any consideration as to whether or not they were a cultural resource or part of the unique scenery and natural value of the area. Art Sullivan's testimony is as follows:

> Q. In what way have you looked at the horse herds as a cultural resource?
>
> A. I don't regard it as a cultural resource . . . the horses have never been identified in any of the planning documents that the Park Service has prepared as cultural resources.

(Deposition of Art Sullivan, March 18, 1991).

> Q. Can you tell me what the National Park Service believes constitutes unique scenery value?
>
> A. Well, that would — if you sit down with a half dozen National Park System people and put that question to them you would come up with six different answers. There is a broad range of interpretations. We're talking about a broad range and this is something we are continually looking at for advise.

(Deposition of Art Sullivan, March 18, 1991).

The only evidence before the District Court regarding the consideration of the wild horses as a cultural resource was from the evidence presented by Petitioners. Judith Ann Sheets, a naturalist

with the Department of Natural Resources of Missouri testified that from Department of Interior publications she had found that the horses were an extirpated species that were brought back to this continent by the Spaniards in the 1500's. She cited that her studies had found that the horses were an integral part of the settlement and development in the area and a rich source of folklore manifested by stories and song, both published and unpublished. (Transcript on Appeal, June 14, 1991). It was both the personal and professional opinion of Judith Ann Sheets that the horses were a cultural and historical resource.

Petitioners and other "locals" testified regarding the viewpoint in the communities surrounding the area that the horses were a part of their heritage. Evidence was submitted showing the petition efforts and efforts of Congressman Emerson to request the Park Service to at least consider the viewpoint of the overwhelming majority of the Park's constituents and surrounding community members.

Testimony from Art Sullivan indicated that the Park Service did not consider the congressional finding contained in 10 U.S.C § 1331 *Congressional Findings and Declarations of Policy* of any significance in considering the horses as a cultural resource. However, the finding is very strongly worded and echoes the sentiments of the overwhelming majority of park constituents and community members that feel the wild horses are a part of their heritage. The finding is as follows:

> Congress finds and declares that wild free roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the nation and enrich the lives of the American people; . . . .

The majority opinion in the present case did not address the issue as to whether the Park Service's refusal to consider the wild horses as a significant part of the cultural heritage of this region constituted an agency action which was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law". 5 U.S.C. § 706(2)(A). As is indicated above, the Park Service flatly stated the horses were not a cultural resource despite specific policy which requires them to "locate, identify, evaluate, preserve, manage, and interpret qualified cultural resources."

Indeed, *no consideration* was given to the horses as a cultural resource. The letter from Scott Sewell to Congressman Emerson (purported final decision document) failed to mention that aspect entirely. Testimony from Art Sullivan as set forth above indicated that the horses had never been identified in any planning document as a potential cultural resource.

The regulations in the Park Service indicate that determination of cultural resources is an ongoing process. The agency's guidelines and regulations certainly do not foreclose the "locals" who once owned the land upon which the Ozark National Scenic Riverways is now located from requesting the National Park Service to consider the wild horses from their viewpoint — as a part of their heritage, as a part of their history and a part of the unique scenery along the Current and Jack's Fork Rivers as they have existed for as long as anyone can remember.

Certainly, considering the issue as to whether or not the wild horses were given *any* consideration as cultural resources, a reviewing Court may invalidate agency action as arbitrary and capricious. This Court held in *Motor Vehicle Manufacturers Association*, 463 U.S. at 43, 103 S. Ct. at 2867:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on

> factors which Congress has not intended it to consider, *entirely failed to consider an important aspect of the problem,* offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

(Emphasis added).

Further, the Park Service provided no explanation as to why the horses presence in the Park was given no recognition as cultural resources or as part of the natural value or unique scenery of this Ozark National Scenic Riverways.

> To fulfill its function under any appropriate standard of review, however, a Court must be able to ascertain the reasons for an agency's decision. We cannot determine whether an agency has acted correctly unless we are told what factors are important and why they are relevant. Therefore, an agency must provide a reasoned explanation for its actions and articulate with some clarity the standards that governed its decision.

Moon v. U.S. Department of Labor, 727 F. 2d 1315 at 1318 (1984).

CONCLUSION

WHEREFORE, Petitioners Richard Wilkins and Roland Smotherman respectfully request this Honorable Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED JULY 28, 1993

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2871EMCG

Richard Wilkins, et al.,

Appellees,

vs.

Secretary of the Interior, et al.,

Appellants,

Randy Clark, an individual,

Defendant.

Appeal from the United States District Court for the Eastern District of Missouri

Appellees' petition for rehearing has been considered by the Court and is denied.

July 28, 1993

Order Entered at the Direction of the Court:
s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED JUNE 15, 1993

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2871

Richard Wilkins; Roland Smotherman,

Appellees,

v.

Secretary of the Interior; Manuel Lujan, in his official capacity; Superintendent of Ozark National Scenic Riverways; Art Sullivan, in his official capacity as National Park Superintendent;

Appellants,

Randy Clark, an individual,

Defendant.

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: February 18, 1993

Filed: June 15, 1993

Before McMILLIAN, MAGILL and LOKEN, Circuit Judges.

McMILLIAN, Circuit Judge.

Appendix B

The Secretary of the Department of the Interior and the Superintendent of the Ozark National Scenic Riverways (collectively appellants) appeal from an order issued in the United States District Court for the Eastern District of Missouri permanently enjoining them from destroying, removing, moving, transporting, molesting or otherwise harming the feral or wild horses in the Ozark National Scenic Riverways Park. *Wilkins v. Secretary of Dep't of the Interior,* No. S91-31-C (E.D. Mo. June 17, 1992) (*Wilkins*). For reversal, appellants argue the district court erred in reviewing the action of the agency *de novo* and in substituting its own judgment for that of the agency. For the reasons discussed below, we reverse the order of the district court and vacate the permanent injunction.

The park, a 140-mile-long strip of land in Missouri along the banks of the Current River and the Jack's Fork River, was authorized by Congress in 1964. Approximately 20 free-roaming, unbranded, unclaimed, wild horses roam a 24-mile stretch of a total of 71,000 acres in the park. The origin of the wild horses is unknown. In 1985, 1989 and 1990, studies and aerial surveys were made to show the impact the wild horses had on the native fauna and plant communities in the park. In May 1990, the park superintendent issued a news release announcing the park would consider proposals to remove the wild horses from the park because they "are ill-equipped to contend with the harsh winters, disease, injury, food shortages and other environmental factors detrimental to their well-being" and because there "have been numerous reports of harassment and even shootings."[1] The National Park Service thereafter selected a plan, approved by the Secretary, for the removal of the wild horses and issued a special use permit to Randy Clark to trap the wild horses and remove them

1. Reports include the shooting of a mare for her colt, the death of a stallion resisting capture, and the shooting of a horse purportedly to attract coyotes.

— either placing them for adoption or disposing of them. The government was to pay $1500 for the removal of the first five horses and $300 for each additional horse thereafter. Adverse public reaction included a petition signed by one thousand people and criticism from the Congressional representative for the district within which the park is located. In February 1991, the Secretary announced that the park would proceed with its plan to remove the wild horses from the park.

A group of local citizens (appellees) filed this action in federal district court against appellants, seeking an injunction to block the removal of the wild horses. Appellees claimed removal of the wild horses would deprive them of the opportunity to view the wild horses and would result in the disappearance of a part of the history, culture, and unique scenery of their community. The district court immediately granted a temporary restraining order.

After a trial on the merits, the district court issued a permanent injunction against the removal of the wild horses from the park, based on review under the arbitrary and capricious standard set forth in the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A). *Wilkins,* slip op. at 9. The district court found the Secretary's decision to remove the wild horses was a clear error in judgment because the evidence at trial did not show the wild horses were detrimental to the use of the park. *Id.* at 12. The district court concluded the allegations of damage caused by the wild horses were exaggerated and found the wild horses did not pose any threat to visitors of the park or to park resources. *Id.* The district court further found that the Secretary failed to consider whether the wild horses were a cultural or historical resource. *Id.* at 13. This appeal followed.[2]

---

2. Clark also filed an appeal (No. 92-3239) and the two appeals were (Cont'd)

Appendix B

Appellants agree that the district court correctly declared that the "arbitrary and capricious" standard of review, 5 U.S.C. § 706(2)(A), governed this case. Appellants argue that, in applying this standard, a reviewing court's task is to determine whether the agency considered relevant factors and articulated a rational connection between the facts found and the choice made. They argue that, here, under the "rubric of clear error of judgment," the district court improperly reviewed the decision of the Secretary *de novo* and thus substituted its own judgment for that of the Secretary. Appellants argue the district court failed to defer to or fully analyze the administrative record and instead, by relying extensively on trial testimony, improperly developed its own record on which it based its decision.

Appellees argue the district court properly found the Secretary's decision violated the management policies of the National Park Service and was "arbitrary and capricious." Appellees argue the district court's decision should be upheld because the Secretary's action violated National Park Service policy which states "the management of exotic species already present will be undertaken wherever such species threaten park resources or public health." The wild horses are considered exotic species to the park; however, the district court found the evidence did not support the Secretary's findings that the wild horses threatened park resources and the public health. *Id.* at 13. We disagree.

Agencies typically perform three important functions: rulemaking, adjudication, and informal decision-making. Agency

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(Cont'd)
consolidated for purposes of appeal. However, Clark's appeal was later dismissed for failure to prosecute. *Wilkins v. Clark*, No. 92-3239 (8th Cir. Nov. 23, 1991) (order).

decisions should only be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A); *Gettler v. Lyng*, 857 F.2d 1195, 1198 (8th Cir. 1988). The Secretary's decision was an informal agency decision for which the standard of review is to determine if the agency decision was arbitrary and capricious. 5 U.S.C. § 706(2)(A). Federal courts must defer to "any reasonable interpretation given to the statute by the agency charged with its administration," as well as to the agency's interpretations and application of its regulations and policies in carrying out its statutory duties, unless "plainly erroneous." *Arkansas Poultry Federation v. United States Environmental Protection Acency*, 852 F.2d 324, 325 (8th Cir. 1988).

When reviewing agency decisions, both a district court and an appellate court must make an independent decision based on the identical record that was before the fact finder. *Sierra Club v. Davies*, 955 F.2d 1188, 1192 (8th Cir. 1992). We hold that although the district court properly identified the standard of review to be for arbitrary and capricious action, it failed to apply it correctly. The district court concluded that the Secretary made an error in judgment and failed to consider relevant facts. *Wilkins*, slip op. at 15. The district court in the present case chose not to remand the matter to the Secretary, and instead developed independent findings of fact at trial. The proper standard of judicial review of agency decision-making does not permit the district court to make independent findings.

We have reviewed the administrative record and conclude there is sufficient evidence in the record to support the Secretary's decision and that the decision was not arbitrary and capricious. Studies have shown that the wild horses graze and trample 40 - 60 acres of planted crops on lands rented to permittee farmers. In

addition to the planted crop damage, the wild horses pose a threat to native plants by nipping young trees and random trampling and grazing. The wild horses also compete directly with native wildlife for forage. The wild horses have made extensive trails along the 24-mile range which have begun to erode causing soil compaction and bank erosion. The wild horses are considered to be exotic species, and their continued presence in the park is in conflict with the purpose of the park which is to maintain, rehabilitate, and perpetuate the park's natural resources inherent integrity. We conclude these findings, set forth in the administrative record, are sufficient to support the Secretary's decision.

Our conclusion is supported by the 1916 Organic Act, 16 U.S.C. § 3, and the decision of the Tenth Circuit in *New Mexico State Game Comm'n v. Udall,* 410 F.2d 1197, 1199 (10th Cir.) (*New Mexico*), *cert denied,* 396 U.S. 961 (1969). The court in *New Mexico* construed the 1916 Organic Act in the following manner:

> The obvious purpose of this language is to require the Secretary to determine when it is necessary to destroy animals which, for any reason, may be detrimental to the use of the [national] park. [the Secretary] need not wait until the damage through overbrowsing has taken its toll on the park plant life and deer herd before taking action no less than [the Secretary] would be required to delay the destruction of a vicious animal until after an attack on a person.

Id. Here, likewise, the Secretary need not wait for further damage to the park before taking action.

Accordingly, the order of the district court is reversed and the permanent injunction is vacated.

LOKEN, Circuit Judge, dissenting.

I respectfully dissent. In my view, the National Park Service prejudged the issue, coopered up a series of unsupported rationales in the hope of choking off public opposition, and then ignored well-founded objections from many Park constituents. To suit the Park managers' convenience and preconceived notions of culture and history, we will now incur significant expense and short-term environmental damage to remove a small band of wild horses from the 65,000-acre Ozark National Scenic Riverways. Most users of the Park believe (and the record establishes it is a reasonable belief) that these animals reflect the cultural heritage of the region and contribute toward what Congress intended to foster, with only negligible impact on the Park's other resources and attractions. I am hard-pressed to find a clearer example of arbitrary and capricious agency action.

1. We review informal agency actions to determine if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). If there is "a contemporaneous explanation of the agency decision," the decision must stand or fall on the propriety of that explanation. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1977). Absent a decision document, the question becomes whether "there was such failure to explain administrative action as to frustrate effective judicial review." *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973).

On appeal, the Secretary asserts that the decision document in this case is the Acting Assistant Secretary's February 1991 letter to Missouri Congressman Bill Emerson. But in the district court, Park

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Superintendent Arthur Sullivan, who was tendered by agency counsel as "the most important witness from a legal standpoint," testified on direct examination that a May 1990 press release was the decision document.[1]

Normally, the agency's identification of its decision document should be controlling. But the discrepancy here is troubling. We seek the contemporaneous agency explanation to review. If the Park Service's decision was in fact made in May 1990, then the agency's February 1991 Environmental Assessment, which contains the data summarized by the court to support its decision, is only "post-hoc rationalizations of the agency [that] cannot serve as a sufficient predicate for agency action." *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 539 (1981), citing *Overton Park*, 401 U.S. at 419; *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962); and *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

Moreover, there is more than a nine-month discrepancy here; there is conclusive evidence that the Park managers actually made their decision long before it was announced in the May 1990 press release. This is suggested by the language of the press release itself — "Ozark Riverways is requesting proposals . . . which will remove the horses from park lands and assure their continued well-being."[2] It is confirmed by the testimony of Superintendent

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1. The district court's evidentiary hearing did not exceed the proper scope of judicial review. The Supreme Court has advised that, absent formal agency findings, "it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). *See also Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347, 357 (8th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985).

2. Thus, the agency did not seek public input on *whether* to remove the horses, only on *how to remove them*.

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Sullivan regarding a 1985 internal report entitled "Status and Proposed Management of Feral Horse Population":

> Q Had there been a decision made prior to the [1985] study to remove the horses?
>
> A . . . I don't think there was ever any question about the decision being made, I think the decision was made for us under — under our rules and regulations and under the laws and policies. The management had no leeway . . . . I think the decision is built into the management policies of the National Park System and those in turn emanate from certain pieces of legislation.
>
> Q So you're saying that . . . it was inevitable [that] the rules, regulations, those things that you had cited . . . would mandate you to remove the horses?
>
> A That's correct.

Thus, the record establishes that the purported decision documents — either the May 1990 press release or the February 1991 letter — were generated long after the decision was effectively made. We know that those documents do not state Superintendent Sullivan's view that the decision was required by law. We do not know whether the Acting Assistant Secretary shared Superintendent Sullivan's view of his legal mandate, nor whether the Acting Assistant Secretary understood the real reason for Sullivan's decision. In these circumstances, I would set aside the agency action because there has been, to use the Supreme Court's

phrase, "such failure to explain administrative action as to frustrate effective judicial review." If agency staff with primary responsibility make a decision they consider required by law, and the agency head approves that decision believing it was an exercise of discretion, the decision-making process has failed and the reviewing court must remand for further agency consideration. *See General Elec. Co. v. Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1403-04 (7th Cir. 1984) ("an agency cannot defend its actions on grounds different from those on which the actions were based").

2. I would also set aside this action because Superintendent Sullivan's conclusion that removal was *mandated* (not simply permitted) by governing statutes and regulations is not in accordance with law. Congress created the Ozark National Scenic Riverways "[f]or the purpose of conserving and interpreting unique scenic and other natural values and objects of historic interest . . . management of wildlife, and provisions for use and enjoyment of the outdoor recreation resources thereof by the people of the United States." 16 U.S.C. § 460m. The Natural Park Service Organic Act authorizes the Secretary "to provide in his discretion for the destruction of such animals and of such plant life *as may be detrimental to the use*" of national parks. 16 U.S.C. § 3 (emphasis added).

In implementing these laws, the Park Service properly gives priority to native species of plants and animals over non-native or "exotic" species. Superintendent Sullivan opined that the Park Service's Natural Resource Management Policies require removal of the wild horses as an exotic species. Even accepting the agency's view that all horses must be considered non-native because they were brought to North America by Spanish explorers in the 1500s, the Management Policies merely provide:

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Management of Exotic Species Already Present.

> Management of populations of exotic plant and animal species, up to and including eradication, will be undertaken wherever such species threaten park resources or public health and when control is prudent and feasible. . . . High priority will be given to the management of exotic species that have a substantial impact on park resources. . . . The decision to initiate a management program will be based on existing, and where necessary newly acquired, scientific information that identifies the exotic status of the species, demonstrates its impact on park resources, and indicates alternative management methods and their probabilities of success.

Because wild horses were there before the Park was established, I think the above-quoted Management Policies required the agency to obtain "scientific information that . . . demonstrates [their] impact on park resources" before taking action to remove them. At a minimum, it is clear that these laws and agency policies do not *require* removal of a non-detrimental exotic species. In other words, Superintendent Sullivan was wrong in believing he was required to remove the horses without any evidence of detrimental impact.

3. Finally, I agree with the district court that the agency's post-hoc rationalizations do not adequately support this action. There is no question that the Park managers labored long and hard to find a detrimental impact that would justify their removal decision, but in my view these efforts failed.

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• *Removal necessary to protect the horses.* The May 1990 press release advanced the unsupported claim that the horses "are ill-equipped to contend with harsh winters, disease, injury, food shortages, and other environmental factors detrimental to their continued well-being." But the agency's own studies showed the horses to be in good health, except when harassed by Park users.[3]

• *Damage to other Park resources.* The 1985 study showed minimal damage to permittee crops, other plant life, or the river banks. Park management concluded in 1985 that "extensive investigation would take considerable time and money which may not be necessary," and the agency's February 1991 Environmental Assessment contained virtually no additional information.

• *Risk of future detriment.* The Acting Assistant Secretary's February 1991 letter warned ominously that "the feral horses are competing directly for forage with several species of wildlife." I agree with the court that the Secretary may base a decision upon perceived future harm and need not delay remedial action until great damage to the Park has been done. But the perception of future harm must be rational. Here, the agency's speculation about future harm was predicated upon significant increases in the horse population, whereas its studies show that the wild horses have kept to their relatively small fraction of the Park and have maintained their very small population over a long period of time. Thus, the agency's February 1991 Environmental Assessment could only lamely conclude that "[p]ermitting the horses to stay would require [the Park Service] to document and mitigate impact on listed species and habitats in the area."

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3. I reject the agency's suggestion that the horses must be removed to protect them from human harassment. If poachers kill moose or grizzly bears or bison in Yellowstone National Park, would the Park Service seriously suggest that the *wildlife* be removed?

• *Subjective factors.* Park management believes that it is "inappropriate" to allow wild horses to graze in a designated "natural zone" of the Park, even though most of the grazing they do is on natural zone land leased to agricultural permittees for modern mechanized farming. That subjective judgment of the responsible agency is clearly entitled to significant weight. But the Park Service Management Policies also require park managers to "locate, identify, evaluate, preserve, manage, and interpret qualified cultural resources." In this case, the Park managers flatly refused to consider whether wild horses are a significant part of the cultural heritage of this region. In the Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. § 1331 *et seq,* Congress declared:

> It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture [and] are to be considered . . . as an integral part of the natural system of public lands.

The Park Service correctly notes that this act applies only to the Bureau of Land Management and the National Forest Service. However, the statute is relevant in determining whether wild horses are cultural resources worthy of protection if they are not otherwise detrimental to a national park. Superintendent Sullivan and the Park Service simply ignored this highly relevant factor.

In these circumstances, I believe that the district court correctly set aside the agency action at issue. The agency decision neither flowed from the reasons offered in its decisional documents nor reflected consideration of all relevant factors. The Park Service has translated statutes and policies that grant discretion to control exotic species into an absolute mandate for

removal, thereby ignoring important statutory directives, such as the need to conserve the Park's "natural values and objects of historic interest" and provide "for use and enjoyment of the outdoor recreation resources thereof by the people." 16 U.S.C. § 460m. Without otherwise restricting the agency in its future management of the Park,[4] I would enjoin implementation of this arbitrary and legally unsound decision.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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4. I agree with the Secretary that the district court's permanent injunction should be vacated because it improperly precludes the agency from revisiting this issue in the future. That is an overbroad remedy for informal agency action that is found to be arbitrary, capricious, or not in accordance with law.

APPENDIX C — ORDER AND MEMORANDUM AND OPINION OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, SOUTHEASTERN DIVISION FILED JUNE 17, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

No. S91-31-C

RICHARD WILKINS and ROLAND SMOTHERMAN,

Plaintiffs,

vs.

SECRETARY OF THE INTERIOR MANUEL LUJAN, in his official capacity; SUPERINTENDENT OF THE OZARK NATIONAL SCENIC RIVERWAYS, ART SULLIVAN, in his official capacity as National Park Superintendent; RANDY CLARK, an individual;

Defendants.

ORDER

In accordance with the memorandum and opinion filed herein this day,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is hereby entered in favor of plaintiffs and against defendants in this cause of action.

IT IS FURTHER ORDERED that defendants shall be permanently enjoined from destroying, removing, moving, transporting, molesting or otherwise harming the feral horses in the Ozark National Scenic Riverways.

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Dated this 17th day of June, 1992.

s/ Stephen Limbaugh
UNITED STATES DISTRICT JUDGE

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
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No. S91-31-C

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Defendants.

MEMORANDUM AND OPINION

Approximately twenty wild horses roam freely in small bands on the land of the Ozark National Scenic Riverways. The Secretary of the Interior and the National Park Service plan to remove the wild horses. The Court previously granted plaintiffs' motion for temporary restraining order to halt the removal of the horses. The Plaintiffs also filed a complaint for permanent injunctive relief and this case was tried before this Court sitting without a jury on June 14, 1991. Defendants seek dissolution of the temporary restraining order and denial of plaintiff's motion for a permanent injunction. This Court, having now considered the pleadings, the testimony of the witnesses, the deposition testimony, the documents in evidence, and being fully advised in the premises, hereby makes the following findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52.

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I. *Findings of Fact*

The Ozark National Scenic Riverways (the "Riverways") are located in southeast Missouri, and are managed and administered by the National Park Service (the "Park Service"). The Park Service is part of the Department of Interior.

Defendants Manuel Lujan and Arthur Sullivan are duly appointed officers, agents and employees of the United States government within the Department of the Interior. In particular, Manuel Lujan is the Secretary of Interior, and Arthur Sullivan is the Park Service executive serving as the superintendent of the Riverways. Defendant Randy Clark is a Missouri resident who was awarded a government contract to remove the wild horses from the Riverways.

Plaintiffs Richard Wilkins and Roland Smotherman are citizens of Missouri who reside in the vicinity of the Riverways.

Plaintiffs instituted this civil action for the purpose of enjoining the defendants from removing certain wild or feral (not domesticated) horses from the Riverways.

Congress authorized the Ozark Riverways in 1964. 16 U.S.C. § 460m *et seq.* The Riverways park is a 140-mile-long narrow strip of land along the banks of the Current River and the Jacks Fork River in Missouri. The Enabling Act for the Riverways states that its purpose is for ". . . conserving and interpreting unique, scenic and other natural values and objects of historic interest. . . ." Of the lands falling within the Riverways, about 51,500 acres are federally owned, 14,000 acres are state owned and 6,400 acres are privately owned. Between one and two million people visit the Ozark Riverways annually. Almost sixty percent of the visitors float some portion of the rivers.

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One or two bands of feral horses roam along a 24-mile stretch of the Ozark Riverways. The horses usually remain near the water, but sometimes roam five or more miles away. The horses roam in two separate herds of about 10 horses. The total number of horses over the years has remained at about 20. The horses appear in good health, showing shiny coats, adequate weight and well-defined muscles. The existence of the wild horses and their exploits are frequent topics of conversation and a source of lore for the residents. Sightings of the wild horses are rare and considered extraordinary and delightful. Many people come to the area in hope of spotting the horses. Some take a horseback trail ride for that purpose.

The Park Service considers the horses an "exotic species" rather than a "native species." Under Park Service management policies,

> [e]xotic species are those that occur in a given place as a result of direct or indirect, deliberte or accidental actions by humans (not including deliberate reintroductions) . . . The exotic species introduced because of such human action would not have evolved with the species native to the place in question, and, therefore, would not be a natural component of the ecological system characteristic of that place.

Horses that were natives of the continental United States died out on this continent about 8,000 B.C. Spanish explorers introduced domestic horses onto this continent in the sixteenth or seventeenth century. The origin of the wild horses at the Ozark Riverways is unknown. Residents of the Ozark Riverways area believe they are descendants of horses that were released or escaped in the 1940s or 1950s before "open range" ended in Missouri.

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The policy of the Department of the Interior is to remove exotic animals from United States land. Arthur Sullivan, superintendent of the Riverways, testified that the guidelines for operating the Park Service and the Riverways mandate removal of the horses. To support the decision to remove the horses, the Park Service conducted a study in 1985. Later, in April 1989, two investigators from the Humane Society reported abuse of the horses and sought their removal.

In May of 1990, the Park Service gave public notice of the plan to remove the horses and requested public comment and proposals on how to best remove the horses. The announcement generated controversy and opposition by local residents. In response, the Humane Society changed its position and it now opposes removal of the horses.

A second study, which concluded in February 1991, was conducted and found no significant impact by the decision to remove horses. Both studies recommend that the horses be rounded up and put up for adoption.

Ultimately, defendants elected to issue a special-use permit to defendant Randy Clark to remove the horses. Mr. Clark proposed to trap the horses and then place them for adoption to individual owners. Mr. Clark began his attempts to capture the horses. Plaintiffs filed this lawsuit, the Court entered the temporary restraining order and Mr. Clark ceased his attempts to corral the horses. Plaintiffs requested a special use permit to manage and care for the horses, but defendants denied the permit.

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II. *Conclusions of Law*

A. *Jurisdiction and Venue*

This Court has jurisdiction pursuant to 28 U.S.C. 1331 as this action arises under laws of the United States. Venue is proper in the Southeastern Division of the Eastern District of the United States District Court, as this is where plaintiffs reside. 28 U.S.C. § 1402.

B. *Standing*

As a threshold matter, the Court must detemine whether plaintiffs have standing to bring this action. Article III of the U.S. Constitution requires a plaintiff to show that he has suffered some actual or threatened injury as a result of the defendant's allegedly illegal conduct, that the injury is fairly traceable to the challenged action, and that he is likely to obtain redress by a favorable decision. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S. Ct. 752, 758, 70 L. Ed. 2d 700 (1982). In addition the plaintiff must satisfy the "prudential" requirement, that is asserted interests "fall within the 'zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Valley Forge*, 454 U.S. at 475, 102 at 760 (quoting *Association of Data Processing Service Organization v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827, 830, 25 L. Ed. 2d 184 (1970)).

Plaintiff Richard Wilkins is a resident of Birch Tree, Missouri. He lives about eight miles from the Riverways and visits the park frequently. By occupation, he operates a feed store. Plaintiff Roland Smotherman also is a lifelong resident of Birch Tree, Missouri. He shoes and trains horses for a living. Both plaintiffs are members of the Wild Horses League, which was formed in

November 1990. The League is a loose association of about 13 people interested in seeing the horses remain in the Riverways park. Both plaintiffs have sighted the wild horses on occasions and have heard tales of them all of their lives. Plaintiffs allege that the defendants' removal of the horses will harm them as they use the Riverways.

For plaintiffs to assert standing, their injury in fact need not be economic in nature. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686, 93 S. Ct. 2405, 2415, 37 L.Ed.2d 254 (1973). "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society." *Sierra Club v. Morton*, 405 U.S. 727, 734, 92 S. Ct. 1361, 31 L.Ed.2d 636 (1972). The threatened injury is the deprivation of plaintiffs' opportunity to view the wild horses and the disappearance of part of the history and culture of their community. The threatened injury is directly traceable to the defendants' actions and it is reasonably clear that plaintiffs' injury could be remedied by judicial review of the administrative action. Finally, the Enabling Act for the Ozark Riverways states its purpose is to conserve and interpret unique, scenic and other natural values and objects of historic interest, therefore plaintiffs' interest falls within the relevant "zone of interests" of the statute. The Court concludes that plaintiffs do have standing to bring this action in their individual capacities.

C. *Reviewability*

The next question is whether plaintiffs are entitled to any judicial review. The Administrative Procedure Act ("APA") provides that

> [a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency, action within the meaning of a relevant state, is entitled to judicial review thereof. . . . Nothing herein affects limitations on judicial review.

5 U.S.C. § 702. Section 701 of the APA provides that the action of "each authority of the Government of the United States", which includes the Secretary of the Interior, is subject to judicial review except where there is a statutory prohibition on review or where "agency action is committed to agency discretion by law." In this case, there is no indication that Congress meant to prohibit judicial review.

The APA exception for action "committed to agency discretion" is very narrow. The legislative history of the APA indicates that it is applicable in those rare instances were "statutes are drawn in such broad terms that in a given case there is no law to apply." *Webster v. Doe,* 486 U.S. 592, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988) quoting *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410, 91 S.Ct. 814, 821, 28 L.Ed.2d 136 (1971) (citing S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)). "[R]eview is not to be had if the Statute is drawn so that a court would have no meaningful standard against which to judge an agency's exercise of discretion." *Webster,* 108 S.Ct. at 2052 quoting *Heckler v. Chaney,* 470 U.S. 821, 830, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985).

When Congress created the Riverways, it explicitly provided that the creation of the Riverways was

> for the purpose of conserving and interpreting scenic and other natural values and objects of

> historic interest, including preservation of portions of the Current River and Jacks Fork River in Missouri as free-flowing streams, preservation of springs and caves, management of wildlife, and provisions for use and enjoyment of the outdoor recreation resources thereof by the people of the United States . . .

16 U.S.C. § 460m. Congress further provided the Secretary of the Interior and Park Service with the authority to administer the Riverways and manage its natural resources in accordance with the statutes governing management of all national parks, 16 U.S.C. § 1-5.

The Act creating the Park Service provides that its purpose "is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1. The Act governing the Park Service specifically provides that the Secretary "may also provide in his discretion for the destruction of such animals and of such plant life *as may be detrimental to the use of any said parks,* monuments or reservations." 16 U.S.C. § 3 (emphasis added).

The enabling act and the statutes governing management of national parks provide "law to apply" and thus the exemption for action "committed to agency discretion" is inapplicable.

D. *Standard of Review*

The APA establishes the proper standard for review. Section

706(2)(A) of the APA permits the Court to hold unlawful and set aside agency action, findings and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706.

E. *Analysis*

The Court must first consider whether the defendants acted within the scope of their authority in deciding to remove the horses from the Riverways. *Overton Park,* 401 U.S. at 415-16.

The Secretary has authority to protect the lands entrusted by Congress to the Department of the Interior. *Free Enterprise Canoe Renters Ass'n. v. Watt,* 711 F.2d 852 (8th Cir. 1983). If the horses were detrimental to the Riverways, the Secretary would have the authority to destroy them. *See* 16 U.S.C. § 3. Arguably, at least, this authority also could include the authority to remove the horses.

The Court must next decide, however, whether the decision to remove the horses was based on consideration of relevant facts and whether there has been a clear error of judgment. *Overton Park,* 401 U.S. at 416.

As previously noted, the purpose of the Park Service "is to conserve the scenery and the natural and historic objects and the wild life therein . . . by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1. Congress granted the Secretary authority to destroy animals and plant life "as may be detrimental to the use of any said parks, monuments or reservations." 16 U.S.C. § 3. Congress established the Riverways "for the purpose of conserving and interpreting scenic and other natural values and objects of historic interest, . . . including . . . management of wildlife . . . ." 16 U.S.C. § 460m. The management

policies of the Department of the Interior distinguish native, or naturally occurring, species from "exotic species." The feral horses are technically "exotic," because they were originally introduced by man and are not indigenous wildlife. The policies provide for protection of native animals and state that only native species will be allowed in "natural zones," which includes the area in which the horses roam. The policies also provide for management, including destruction or removal, of exotic species "already present" in certain circumstances.

> Management of Exotic Species Already Present. Management of populations of exotic plant and animal species, up to and including eradication, will be undertaken wherever such species threaten park resources or public health and when control is prudent and feasible. Examples of threatening situations include
>
> > posing a public health hazard as determined by the Centers for Disease Control or a hazard to public safety
> >
> > disrupting the accurate presentation of a historic scene
> >
> > damaging historic or archeological resources
> >
> > interfering with natural processes and the perpetuation of natural features or native species (especially those that are endangered, threatened, or otherwise unique) significantly hampering the management of park or adjacent lands

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> High priority will be given to the management of exotic species that have a substantial impact on park resources and that can reasonably be expected to be successfully controlled . . . .

Management Policies, U.S. Department of the Interior, NPS, 1988.

Mr. Sullivan testified, by deposition, the Enabling Statute for the Riverways was interpreted in light of the two basic missions of the Park Service: preservation of cultural and natural resources and making those resources available to the public for outdoor recreational use.

Mr. Sullivan stated that he does not regard the horses as a cultural resource nor does he consider them part of the "unique scenery" of the Riverways. In his opinion, the horses should be removed because they are "exotic" species and because "they do not fit into the natural scheme of things." He believed that because the horses were feral animals, the Park Service had no alternative but to remove them. Other factors that were considered were that the horses had damaged about six acres of crops, that they compete for certain foods with the native wildlife, that they are a potential safety hazard to park visitors and that they could be potential carriers of disease.

David Erickson, assistant chief in the division of wildlife for the Missouri Department of Conservation, testified at trial on behalf of defendants. Mr. Erickson spent a day in the "impact area" to observe the damage done by the horses. Mr. Erickson testified that the damage done by the wild horses was "surprising." The horses left hoof tracks where they walked and also ate vegetation. The horses eat cane, which places them in competition with the warbler, a bird that also inhabits the area.

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The Court considers the allegations of damage caused by the horses to be exaggerated.

The Court concludes that the Secretary made a clear error in judgment by the determination that the horses must be removed. First, the Secretary would have the authority to destroy the horses if they were detrimental to the park. *See* 16 U.S.C. § 3. The Secretary argues that this authority also permits removal of the horses. Nonetheless, the evidence simply does not show that the horses are detrimental to the use of the Riverways park or that they are any threat to park resources. *See* 16 U.S.C. § 3. This is a band of, at most, 20 horses in a park of nearly 70,000 acres, or one horse to 3,500 acres. Damage to six acres of crops and the other minor problems from the horses certainly is not detrimental to the use of the Riverways park. In fact, there was testimony that the damage caused by the attempted removal was actualy greater than the damage the horses themselves caused to the vegetation. The horses, which are rarely even sighted, shy away from people and do not pose any threat to visitors in the park.

Second, the Park Service management policies anticipate management of exotic species, up to and including eradication, wherever such species threaten park resources or public health. The fact tht the policies limit when management — *including removal* — will be undertaken necessarily means that unless that standard is met the Park Service will not interfere with a species that is of no threat to the park. Again, the evidence simply does not show that the horses are of any threat to the park resources or public health. The horses certainly have not significantly hampered the management of the park or of adjacent lands nor do they fall within any of the examples of threatening situations set out in the management policies. Thus, under the Park Service policies, removal is improper.

Further, the Secretary failed to consider relevant facts as to whether the horses are a cultural or historical resource.

At the time he made the decision to remove the horses, Mr. Sullivan was aware that Congress enacted the Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. §1331-1340, to protect wild horses and burros as "living symbols of the historic and pioneer spirit of the West." The Act declares wild horses and burros to be "an integral part of the natural system of the public lands," 16 U.S.C. § 1331, and mandates that the animals be managed "as components of the public lands." *Id.* at 1333(a). The Act directs the Secretary to protect and manage the wild horses and burros "in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands." *Id.* Mr. Sullivan determined, however, that the Act applies only to lands administered by the U.S. Forest Service and the Bureau of Land Management. Because the Park Service manages the Ozark Riverways, the Wild Free-Roaming Horses and Burros Act did not apply to it, he concluded. The Act, nonetheless, certainly demonstrates Congressional intent to protect wild horses.

Additionally, the views of local residents on the horses as a cultural resource apparently were disregarded. No one questions that the horses ran wild before the creation of the park. Numerous lifelong residents of the area testified that they consider the horses an important part of the local scenery and culture. They enjoy the thrill of sighting the horses running wild on what was once the open range.

In September 1990, U.S. Representative Bill Emerson wrote Mr. Sullivan and informed him that he had been contacted by more than 1,000 individuals in response to the Park Service's proposal to remove the wild horses and stating the "tremendous opposition to

the removal of the horses." Representative Emerson also wrote that the horses had adapted extremely well to the environment and suggested that provisions should be made to allow the horses to continue to roam the area, with re-evaulation if they, in fact, become a detriment. Mr. Sullivan said he recalled the letter, but was not sure if it was included in the 1991 report.

Representative Emerson wrote a follow-up letter in February 6, 1991 to Mr. Lujan. He wrote that letter to contradict two justifications that the Park Service offered for the removal of the horses. One reason was that Missouri law mandated removal of the horses. A letter from the Missouri Attorney General's Office eliminated that reason. A second justification was that the horses were not native species. Rep. Emerson pointed out that horses were probably present in the area at the time it was settled and that rainbow trout, brown trout and various carp present in the Riverways were not native species.[1]

Further, contrary to Park Service representations of poor health of the horses in a press release announcing its intention to remove the horses, its own 1985 study stated that the horses appear in good health, showing shiny coats, adequate weight and well-defined muscles. Local residents who have seen the horses agree that they are in good health.

Based on the foregoing, the Court concludes that the decision to remove the horses constituted a clear error in judgment as to whether governing statutes and management policies required

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1. The Park Service responded that allowing the horses to roam at the Riverways is contrary to the purpose of the park. The Park Service stated that the horses compete for forage with several species of wildlife, "including valued park wildlife" and that they had damaged five to six acres of vegetation.

removal of the horses and the decision failed to consider relevant facts, in particular, the damage caused by removalof the horses and whether the horses are cultural or historical objects. The facts simply did not show that the horses are a detriment or a threat to the park. Their removal is inconsistent with the purpose of the Park Service, that is, to conserve the scenery and the natural and historic objects and the wild life in the parks as to leave them unimpaired for the enjoyment of future generations. 16 U.S.C. § 1.

Because the Court concludes that the Secretary made an error in judgment and failed to consider relevant facts, it is unnecessary to consider whether the administrator followed the necessary procedural requirements. *Overton Park,* 401 U.S. at 417.[2]

For the foregoing reasons, judgment is entered in favor of plaintiffs and against defendants in this cause of action.

Dated this 17th day of June, 1992.

s/ Stephen Limbaugh
UNITED STATES DISTRICT JUDGE

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2. The Court does note, however, Mr. Sulivan testified that he did not think it was necessary to hold a public hearing on the decision to remove the horses because there was no other option than to remove the horses.

APPENDIX D — DECISION DOCUMENT - NEWS RELEASE, U.S. DEPARTMENT OF INTERIOR, NATIONAL PARK SERVICE DATED MAY 3, 1990

NEWS RELEASE U.S. department of the interior

national park service

For Immediate Release

Stray Horses

. . . Horses running loose on private and public lands in the vicinity of Two Rivers and other areas along the Current and Jacks Fork Rivers are becoming a concern for many area residents, according to Ozark Riverways' Superintendent Art Sullivan. "While the problem is not confined to the park, individuals and elected officials have contacted the park expressing their concern for the welfare of the horses," said Sullivan. "The safety and health of the horses are the primary concerns of those who propose some type of action be taken to assure their protection."

These strays are not "wild horses" in the true sense such as those which may be found on ranges in the West, but are domesticated animals which have either wandered or have been turned loose from nearby farms. As such, they are ill-equipped to contend with harsh winters, disease, injury, food shortages and other environmental factors detrimental to their continued well-being. Furthermore, Sullivan noted, there have been numerous reports of harassment and even shootings of the hapless animals either accidently or maliciously. Reports on their numbers vary, but best estimates indicate less than twenty horses survive. Although known to roam these lands for many years, the fact that a larger population does not exist bears mute testimony to the extremely high mortality rate.

Appendix D

Because of these considerations, Ozark Riverways is requesting proposals from any individual, or organization, which will remove the horses from park lands and assure their continued well-being. All suggestions or proposals should be sent to Superintendent, Ozark National Scenic Riverways, P.O. Box 490, Van Buren, Missouri 63965 by June 8, 1990.

Ozark Riverways will consider any reasonable solution to this problem. To assure safety to the horses, the park will ask the Missouri Humane Society to monitor their removal. "Horses are domesticated animals. They belong with people and need the care and kindness of human beings and should not be left to fend on their own in a sometimes hostile environment," Sullivan said. "I'm hopeful the remaining horses can be rescued and placed in good homes," he added. Persons claiming ownership of the horses and who can offer proof of such ownership should contact the Superintendent.

- OZAR -

May 3, 1990

APPENDIX E — DECISION DOCUMENT – LETTER FROM UNITED STATES DEPARTMENT OF THE INTERIOR DATED FEBRUARY 20, 1991

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

February 20, 1991

Honorable Bill Emerson
Member, U.S. House of Representatives
Federal Building
339 Broadway
Cape Girardeau, Missouri 63701

Dear Mr. Emerson:

Thank you for your letter of October 24 to Secretary Lujan concerning the management of feral horses at Ozark National Scenic Riverways (ONSR). We appreciate that you have brought your concerns to our attention and apologize for this delayed response.

Following receipt of your letter, we made a thorough review of our management proposals. As you mentioned, the enabling act for ONSR states that, in part, the purpose of the park is for ". . . conserving and interpreting unique, scenic and other natural values and objects of historic interest . . ." Upon review, we must maintain our position that allowing feral horses to range uncontrolled at ONSR is contrary to this purpose.

Perhaps most importantly, the feral horses are competing directly for forage with several species of wildlife, both game and non-

game species. The National Park Service (NPS) has documented many instances where feral horses compete unfavorably with highly valued park wildlife. Our first and most important duty is to insure that our management activities prevent adverse impacts to indigenous park wildlife resources.

In addition to competition with wildlife for forage within the park there is no question that the feral horses are having other impacts on the park environment. Park staff members have documented observation of 5-6 acres of open fields where the vegetation has been damaged by these horses. An additional 40-60 acres are impacted each year by the animals. The feral animals have trampled some informal trails that consequently are subject to a significant degree of erosion. It is inappropriate for these feral animals to damage valuable park resources that are needed by indigenous wildlife.

To provide for the conservation of the natural and historic values of the park, a General Management Plan was developed and subjected to significant public discussion prior to approval in 1984. The area where the horses have been grazing was described in the General Management Plan as a "natural zone". In 1984, there was no identifiable controversy regarding the natural zone designation, but such a designation makes it inappropriate to allow the grazing of these animals in that area.

We are also concerned because the grazing of feral livestock of any kind in a park area is not in concert with Federal law, The Act of March 27, 1978 (Public Law 95-250), states that, in part, " . . . activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which

these various areas have been established, except as may have been or shall be directly or specifically provided by Congress." Congress has not provided for grazing activities in ONSR.

You rightly note that the Wild Free-Roaming Horses and Burros Act of 1971 allows the foraging of horses on certain lands administered by the U.S. Forest Service and the Bureau of Land Management. However, the provisions of that act do not apply to lands managed by the NPS.

Based upon these considerations it is appropriate to remove the feral animals from the park before more significant damage occurs. Again, thank you for your concern. If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

s/ Scott Sewell
Acting Assistant Secretary for Fish
and Wildlife and Parks

Copy to your Washington, D.C., office

APPENDIX F — PUBLIC LAW 88-492

Public Law 88-492

AN ACT

To provide for the establishment of the Ozark National Scenic Riverways in the State of Missouri, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, for the purpose of conserving and interpreting unique scenic and other natural values and objects of historic interest, including preservation of portions of the Current River and the Jacks Fork River in Missouri as free-flowing streams, preservation of springs and caves, management of wildlife, and provisions for use and enjoyment of the outdoor recreation resources thereof by the people of the United States, the Secretary of the Interior (hereinafter referred to as the "Secretary") shall designate for establishment as the Ozark National Scenic Riverways the area (hereinafter referred to as "such area") generally depicted on map numbered NR OZA 7002 entitled "Proposed Ozark National Rivers" dated December 1963 which map is on file for public inspection in the office of the National Park Service, Department of the Interior: *Provided*, That the area so designated shall not include more than sixty-five thousand acres of land now in private ownership and that no lands shall be designated within two miles of the present boundaries of the municipalities of Eminence and Van Buren, Missouri. The Secretary, with the concurrence of the State, shall designate for inclusion in the Ozark National Scenic Riverways, the lands composing Big Springs, Alley Springs, and Round Spring State Parks, and the Secretary is hereby directed to negotiate with the State for the donation and the inclusion of such park lands in the Ozark National Scenic Riverways.

Appendix F

Sec. 2. The Secretary may, within the area designated or altered pursuant to section 4, acquire lands and interests therein, including scenic easements, by such means as he may deem to be in the public interest: *Provided*, That scenic easements may only be acquired with the consent of the owner of the lands or waters thereof: *And provided further*, That any parcel of land containing not more than five hundred acres, which borders either the Current River or the Jacks Fork River, and which is being primarily used for agricultural purposes, shall be acquired by the Secretary in its entirety unless the owner of any such parcel consents to the acquisition of a part thereof. Property so acquired which lies outside the boundary generally depicted on the map referred to in section 1 of this Act may be exchanged by the Secretary for any land of approximately equal value within the boundaries. Lands and waters owned by the State of Missouri within such area may be acquired only with the consent of the State. Federally owned lands or waters lying within such area shall, upon establishment of the area pursuant to section 4 hereof, be transferred to the administrative jurisdiction of the Secretary, without transfer of funds, for administration as part of the Ozark National Scenic Riverways.

Sec. 3. Any owner or owners, including beneficial owners (hereinafter in this section referred to as "owner"), of improved property on the date of its acquisition by the Secretary may, as a condition to such acquisition, retain the right of use and occupancy of the improved property for noncommercial residential purposes for a term ending at the death of such owner, or the death of his spouse, or at the death of the survivor of either of them. The owner shall elect the term to be reserved. The Secretary shall pay to the owner the fair market value of the property on the date of such acquisition less the fair market value on such date of the right retained by the owner.

Appendix F

Sec. 4. When the Secretary determines that lands and waters, or interests therein, have been acquired by the United States in sufficient quantity to provide an administrable unit, he shall declare establishment of the Ozark National Scenic Riverways by publication of notice in the Federal Register. The Secretary may thereafter alter such boundaries from time to time, except that the total acreage in the Ozark National Scenic Riverways shall not exceed sixty-five thousand acres, exclusive of land donated by the State of Missouri or its political subdivisions and of federally owned land transferred pursuant to section 2 of this Act.

Sec. 5. (a) In furtherance of the purposes of this Act, the Secretary is authorized to cooperate with the State of Missouri, its political subdivisions, and other Federal agencies and organizations in formulating comprehensive plans for the Ozark National Scenic Riverways and for the related watershed of the Current and Jacks Fork Rivers in Missouri, and to enter into agreements for the implementation of such plans. Such plans may provide for land use and development programs, for preservation and enhancement of the natural beauty of the landscape, and for conservation of outdoor resources in the watersheds of the Current and Jacks Fork Rivers.

(b) The secretary shall permit hunting and fishing on lands and waters under his jurisdiction within the Ozark National Scenic Riverways area in accordance with applicable Federal and State laws. The Secretary may designate zones where, and establish periods when, no hunting shall be permitted, for reasons of public safety, administration, or public use and enjoyment and shall issue regulations after consultation with the Conservation Commission of the State of Missouri.

Sec. 6. The Ozark National Scenic Riverways shall be

administered in accordance with the provisions of the Act of August 25, 1916 (39 Stat. 535), as amended and supplemented, and in accordance with other laws of general application relating to the areas administered and supervised by the Secretary through the National Park Service; except that authority otherwise available to the Secretary for the conservation and management of natural resources may be utilized to the extent he finds such authority will further the purposes of this Act.

Sec. 7. (a) There is hereby established an Ozark National Scenic Riverways Commision. The Commission shall cease to exist ten years after the date of establishment of the area pursuant to section 4 of this Act.

(b) The Commission shall be composed of seven members each appointed for a term of two years by the Secretary as follows:

(1) Four members to be appointed from recommendations made by the members of the county court in each of the counties in which the Ozark National Scenic Riverways is situated (Carter, Dent, Shannon, and Texas), one member from the recommendations made by each such court;

(2) Two members to be appointed from recommendations of the governor of the State of Missouri; and

(3) One member to be designated by the Secretary.

(c) The Secretary shall designate one member to be chairman. Any vacancy in the Commission shall be filled in the same manner in which the original appointment was made.

(d) A member of the Commission shall serve without compensation. The Secretary shall reimburse members of the Commission for travel, subsistence, and other necessary expenses incurred by them in the performance of the duties vested in the Commission.

(e) The Secretary or his designee shall from time to time consult with the members of the Commission with respect to matters relating to the development of the Ozark National Scenic Riverways, and shall consult with the members with respect to carrying out the provisions of this Act.

(f) It shall be the duty of the Commission to render advice to the Secretary from time to time upon matters which the Secretary may refer to it for its consideration.

Sec. 8. There are hereby authorized to be appropriated such sums (but not more than $7,000,000 for the acquisition of lands or interests in lands) as are necessary to carry out the purposes of this Act.

Approved August 27, 1964.

Sections 301(10) and 401 of Pub. L. No. 92-272 (Apr. 11, 1972), 86 Stat. 120, 121, 122, 123, state:

> SEC. 301. The Secretary of the Interior is authorized to revise the boundaries of the following units of the national park system:
>
> * * *
>
> (10) Ozark Scenic National Riverways, Missouri: to add approximately 1,670 acres;

Appendix F

* * *

SEC. 401. The third sentence of section 2 [16 U.S.C. 460m-1] of the Act of August 27,1964 (78 Stat. 608) is amended to read as follows: "Lands and waters owned by the State of Missouri within such area may be acquired with the consent of the State and, notwithstanding any other provision of law, subject to the provision for reversion to such State conditioned upon the continued use of the property for National Scenic Riverway."

APPENDIX G — CULTURAL RESOURCES MANAGEMENT GUIDELINE, NPS — 28, RELEASE NO. 3, AUGUST 1985

[Chapter 1, Page 1]

INTRODUCTION

The National Park Service (NPS) manages many of America's most important cultural, natural, and recreational resources. From these resources all other park management activities stem; if they are degraded or lost, so are the values of the parks and the experiences of park visitors.

Respecting cultural resources specifically, the "Management Policies" of the Service require the park manager to:

> locate, identify, evaluate, preserve, manage, and interpret qualified cultural resources in every park in such a way that they may be handed on to future generations unimpaired . . . . Consistent with the requirements of law, resources managers and professionals at all levels shall take positive action to perpetuate unimpaired the cultural resources of the National Park System; to prevent adverse effects on these resources by development, visitor use, or resource management activities; and to prohibit vandalism or unauthorized excavation, collection, or appropriation of cultural resources (Ch. V, p. 2).

This policy is the fundamental cultural resource management mission of the Service. It is derived from the Organic Act of 1916 and from historic preservation law. The preferred means for perpetuating cultural resources is through protection and preservation maintenance.

All cultural resources management activities must be undertaken

with the knowledge that special tangible resources (structures, sites, objects, etc.) are finite and nonrenewable. Similarly, intangible cultural traits and behaviors (songs, ceremonies, traditional uses, etc.) shall be accurately represented and interpreted. The Service emphasizes the preservation of authentic resources. Supported by nationally and internationally accepted historic preservation standards, it stresses the perpetuation, rather than re-creation, of extant prehistoric, historic, and cultural resources. Extensive excavations, substantial modifications, extensive restoration, and large scale reconstruction projects often harm more than they preserve.

Authority for planning and management activities for cultural resources within the units of the National Park System has its origins in Federal laws. Laws establish broad Federal policies for cultural resources preservation. They mandate activities that must be performed and provide permissive authorities including specific tools (such as leasing) that may be employed for the management of cultural resources. Appendix B contains a description of the principal legislative authorities. Every unit manager should review the materials found in this appendix prior to the preparation of a General Management Plan or Resource Management Plan.

The principal legislative authorities and Service policies affecting cultural resources indicate the following:

[Chapter 3, Page 1]

CULTURAL RESOURCES MANAGEMENT

INTRODUCTION

This section provides standards and guidelines for park-based

management activities affecting cultural resources. Their implementation and coordination are generally the park superintendent's responsibility, in consultation with discipline specialists. The Secretary of the Interior's "Standards for Archeology and Historic Preservation" is the minimum performance standard for management of cultural resources in the National Park System.

The standards in this chapter are consistent with, yet more restrictive than, the Secretary of the Interior's "Standards for Archeology and Historic Preservation," and may exceed them where they are applicable to park operations. These standards are not a substitute for professional judgment, but rather a guide for ensuring consistent, high quality work.

STANDARDS FOR CULTURAL RESOURCES MANAGEMENT ACTIVITIES

To accomplish the cultural resources management mission of the National Park Service, the following general standards apply:

- The unit's resources are identified, inventoried, and evaluated. Evaluation is based upon historic contexts as identified in the Service document, "History and Prehistory in the National Park System and National Historic Landmarks Program"; or through surveys and studies; relevant State Historic Preservation Plans; or unique park specific themes. Contexts are defined by their subject matter (theme), geographic distribution, and chronological limits. After a resource's significance has been evaluated and the context defined, it will be correlated with one of the established NPS themes for management, interpretation, and regional planning

purposes;

- Decisions concerning the treatment of cultural resources (preservation/stabilization, rehabilitation, restoration, reconstruction, historical furnishings, etc.) are made in a park's General Management Plan, then programmed through the park Resources Management Plan for accomplishment;

- A Resources Management Plan for tangible and intangible cultural resources must be prepared for every park and reviewed on an annual basis, as described in Chapter 2;

- Cultural resources which are subject to natural and human impacts will be systematically and professionally monitored, documented, and evaluated so that appropriate recommendations for their preservation or salvage can be implemented;

[Chapter 3, Page 4]

- Final research reports shall be reproduced and distributed within six months, but no later than one year after submission for editing. They shall be reproduced completely, including footnotes, bibliography, appendixes, and other components. The best format for research reports is the format for standard study types readily retrievable by their primary users. Research is to be retained for reference in historical files, and distributed as described in "NPS-28: Technical Supplement."

Appendix G

STANDARDS FOR ACQUISITION OF LAND CONTAINING CULTURAL RESOURCES

- Preservation of significant cultural resources associated with the principal purposes of a park is a prime consideration in determining the type and extent of property rights to be acquired. Property containing cultural resources shall be acquired in fee simple when only NPS ownership can ensure preservation of those cultural resources or when the property is needed for some other park purpose; the purchase of less-than-fee-simple interests, such as restrictive easements, should be undertaken when a limited interest achieves the preservation or other objective.

- Every reasonable effort shall be made to control sufficient property to protect the significant cultural resources located on it.

STANDARDS FOR PROTECTING CULTURAL RESOURCES

- Each park must inventory and evaluate, in consultation with the State Historic Preservation Office, its cultural resources and the known and potential impacts to the long-term preservation of these cultural resources. This inventory must be included in the park's Resource Management Plan (Ch. 2).

- Park management must safeguard the physical condition or environment of archeological and ethnographic sites and features, historic structures, museum object, and associated museum and field-generated records.

Appendix G

- Protection of cultural resources must be given high priority in park Emergency Operations Plans and must be addressed to the extent appropriate in park Crime Prevention and Physical Security Plans.

- Each park will assess the adequacy of its cultural resource information base and will show in its Resources Management Plan a proposal to correct deficiencies.

STANDARDS FOR MANAGING HISTORIC AND PREHISTORIC STRUCTURES (INCLUDING RUINS)

We should always keep in mind the Service's philosophy "Better to preserve than repair, better repair than restore, better restore than reconstruct." ("Management Policies," Ch. V, p. 15).

[Chapter 3, Page 11]

- All operating vessels are to have an annual U.S. Coast Guard inspection; correction of deficiencies must be made prior to further use.

- All operating vessels must meet the safety, training and inspection requirements of Interior Property Management Regulation 41 CFR 114-38.55.

- Vessels removed from the water for permanent or temporary periods are to be blocked and secured so as to prevent long or short term damage to the fabric or the structure of the vessel.

Appendix G

STANDARDS FOR MANAGING HISTORIC RURAL LANDSCAPE DISTRICTS

- Every reasonable effort will be made to use a rural landscape for its historically intended purpose or to provide a compatible use that requires minimal alteration to its distinguishing natural and cultural components.

- The distinguishing qualities or character of a rural landscape must not be destroyed. Historic material and distinctive natural components are not to be altered or removed.

- All rural landscapes will be recognized as products of their own time. Alterations that have no historical basis and which seek to create an earlier appearance are prohibited.

- Changes that may have taken place in the course of time are evidence of the history and evolution of the rural landscape and its natural and cultural components. If these changes have significance in their own right, the significance should be recognized and respected.

- Distinctive natural and cultural components which characterize the rural landscape shall be treated with sensitivity.

- Distinctive natural and man-made components will be repaired rather than replaced whenever possible. If replacement is necessary, the new component should match the old in composition, design, color, texture, and other visual qualities such as weathering characteristics.

Appendix G

Repair or replacement of missing components will be based on accurate duplications rather than on conjectural designs.

- All treatment work that may affect surface or subsurface archeological resources must be evaluated by an archeologist.

- Alterations and additions to the rural landscape required to accommodate a new use is acceptable when such alterations and additions do not destroy significant natural or cultural components and such design is compatible with the size, scale, color, material, and character of the landscape.

APPENDIX H — EXCERPTS OF RESOURCES MANAGEMENT PLAN AND ENVIRONMENTAL ASSESSMENT – NATIONAL PARK SERVICE 1982

OZARK NATIONAL SCENIC RIVERWAYS

RESOURCES MANAGEMENT PLAN

AND

ENVIRONMENTAL ASSESSMENT

Recommended s/ Arthur L. Salk Date *5/28/82*
Superintendent,
Ozark National
Scenic Riverways

Approved s/ J. F. Dunning Date *12-21-82*
Regional Director,
Midwest Region,
National Park Service

* * *

B. Cultural Resources Management Program

1. Overview and Needs

a. Cultural Resources - Ozark National Scenic Riverways was established for the purpose of preserving and interpreting the unique scenic and other natural values and objects of historic interest in the Park.

An inventory of the cultural resources in the Park resulted in 78 buildings being placed on the List of

Classified Structures, the most prominent of them being the Alley Spring Roller Mill, the Big Spring Historic District, the Chilton-Williams Farm Complex, and the Kleozig Mill and Brandt Farm. These classified structures, except the Big Spring Historic District, reflect the cultural history of the Ozarks from the mid-1800's to late 1920's. The Big Spring Historic District reflects an era when the government played an active role in the management of land in the Ozarks. Limited surveying of archeological resources at OZAR has located 47 archeological sites; an intensive study programmed over the next five years will provide a more accurate inventory of archeological resources in the Riverways.

b. Current Management Procedures - The structures in the Park are managed to reflect and preserve the Ozark culture. Structures such as the Alley Spring Roller Mill and Story's Creek School are settings for cultural demonstrations, exhibits and visitor contact areas. The Big Spring Complex is being managed for its original intent as a place for lodging, dining and Park operations. The remaining structures on the LCS are managed as discovery sites for visitors. Alley Spring Roller Mill is the only cultural resource that is interpreted via a wayside exhibit reflecting the Alley Mill community to the visitor.

The main threat to the structures in the Park has been vandalism and arson. With mileage, limitations being relaxed, increased ranger patrols of the sites should curtail such activity. The Alley Spring Roller Mill, the primary cultural resource in the Park, is in a location frequented by severe thunderstorms and lightning. A

project proposed for the coming years is to install a lightning arrestor to prevent damage due to a lightning strike. One of the options considered in the draft of the General Management Plan is the partial restoration of the Alley Spring Roller Mill. When this is completed the concession operation and non-milling exhibits will be removed. If this is the selected option the Mill will be managed and maintained to a degree that is compatible with the historical significance of the structure. Archeological sites in the Park are currently being managed according to NPS guidelines and legislative mandates. Once a more accurate inventory of sites is completed, management options regarding interpretation can be better determined.

c. Knowledge of Cultural Resources

1. E.O. 11593 cultural resource inventory status. The List of Classified Structures at Ozark Riverways is complete, however, only 1% of the Park has been professionally surveyed for archeological resources and sites. During the next five years an intensive inventory and study of archeological sites will be made under the direction of the Midwest Archeological Center. This study will partially fulfill the E.O. 11593 requirements for the area.

2. Socio-Cultural Inventory - Although Ozark Riverways does not have a formal socio-cultural inventory, the Park does have a documented ethnohistoric and ethnographic data base on the traditional uses and settlement localities in the Park; with this knowledge in hand, the Park has integrated

local people into the Park's staff and their influence is reflected in various resource management decisions.

3. Status of LCS - A list of classified structures has been completed for the Park. There are 78 structures on the list, some of which were judged to be potentially eligible to the National Register. The Register listings will be discussed in another section.

4. Museum Catalog Status - The Scope of Collection statement has been revised for the Park and the museum catalog is current and up-to-date. Any further items collected will be accessioned and curated in accordance with the NPS *Museum Handbook* "Part 2": *Museum Records* and *Manual for Museums.*

5. National Register Listings - The Big Spring Historic District was accepted by the National Register on March 17, 1981. Nominations for the Alley Spring Roller Mill and the Chilton-Williams Farm Complex are pending. The Mount Zion Community Church of Akers and the Peck-Barrett Ranch House were nominated but determined to be ineligible. The Brandt Farm and the Klepzig Mill were identified as potentially eligible, but the nominations must be revised to reflect changes wrought by vandalism. The Cedargrove School and the Welch Cave Hospital were found to be not potentially eligible by the Missouri State Historic Preservation Officer; the National Park Service concurs with this view."

APPENDIX I — EXCERPTS OF DRAFT GENERAL MANAGEMENT PLAN, DEVELOPMENT CONCEPT PLAN, DECEMBER 1981

[Page 10]

CULTURAL RESOURCES

Overview of Ozark Cultural History

The cultural history of the Ozark National Scenic Riverways probably began about 15,000 years ago with Paleo-Indian big game hunters, as evidenced by scattered discoveries of their distinctive spear points. By about 7000 B.C., the Archaic lifeway began to develop as groups adapted to local environments and used a broader range of wild plants and animals. Knowledge of horticulture and pottery was introduced from the lower Mississippi River Valley about A.D. 1, denoting the start of the Woodland period. Yet because of geographic isolation and the natural environment, the Indians of the Ozark Highlands largely retained a more primitive hunting and gathering lifestyle. The cultural elaborations of the Hopewell people in southern Ohio do not seem to have influenced the prehistoric Ozarkians, but the later (A.D. 900 to 1500) Mississippian florescence centered at the prehistoric metropolis of Cahokia (near St. Louis) certainly stimulated the conservative highlanders. There is increasing evidence of Mississippian villages and ceremonial centers throughout southeastern Missouri.

The historic Osage and Quapaw utilized the area primarily for seasonal hunting. The Shawnee and Delaware passed through the area in the early 1800s following displacement from their traditional homelands to the east. They were pushed west by the advancing line of settlement, and by 1830 they were beyond the Missouri border.

Appendix 1

Although earlier Spanish explorers may have passed through the area, French hunters, fur trappers, and miners first began exploiting Ozark resources in the 1700s. However it was not until the early 1800s—after the area was acquired by the United States under the Louisiana Purchase of 1803 and the Osage had been relocated—that Euro-American settlement began. By the 1830s the settlers, largely frontiersmen from the hills of Tennessee and Kentucky, had established the towns of Van Buren and Eminence. Gristmills, sawmills, and schoolhouses became commonplace.

The area had been largely cleared and settled by the 1860s. The Civil War brought destruction and population displacement as a result of guerrilla warfare and bushwhacking. The economy was temporarily stimulated after the war by the growth of the lumber industry, but by the turn of the century, improper land use (by today's standards) had led to timber depletion, soil erosion and a decline in populations of fish, game, and furbearers.

By the 1920s the Ozarks had become an economically depressed rural area. Nevertheless, a rich folk culture persevered.

Archeological Resources

Archeological investigations in the riverways have been limited. Less than 1 percent of the park has been professionally surveyed and many of the earlier efforts do not meet current standards. Table 1 summarizes the archeological investigations conducted to date in the riverways.

* * *

limitations, such as inside a prepared firebreak and under low risk fuel and weather conditions, it is said to be within prescription. Such prescriptions will be prepared for appropriate areas of the riverways. Suppression will continue for all fires not meeting those prescriptions.

Adoption of these policies will involve the development of comprehensive fire management plans and will require vegetational studies and fire-modeling research. The managed fire program will be continually evaluated in its objectives and effects by public involvement and coordination with adjacent agencies and landowners.

CULTURAL RESOURCES

General Policies

The letter and spirit of relevant laws, regulations, and other mandates (e.g., the National Historic Preservation Act of 1966 (16 USC 470), as amended by PL 96-515; Executive Order 11593 of 1971, Protection and Enhancement of the Cultural Environment; the American Folklife Preservation Act of 1976 (PL 94-201) 89 Stat 1130-120 USC 2101-2107; the Archeological Resources Protection Act of 1979 (PL 96-96), as implemented by NPS "Management Policies" and "Cultural Resource Management Guideline," NPS-28 will be reflected in the management of cultural resources in the riverways.

The National Park Service will continue to identify, record, and evaluate cultural resources. Sites or districts that may meet the eligibility criteria of the National Register of Historic Places will

be nominated. Cultural resources acquired with land, easements, or term estates will be professionally evaluated for eligibility to the National Register or the NPS List of Classified Structures. Careful consideration will be given to the type and extent of property rights needed to ensure the preservation of historic structures and archeological sites. Management alternatives for acquired cultural resources will be evaluated on a case-by-case basis in consultation with appropriate NPS regional cultural resource personnel.

All cultural resources will be preserved, if possible, and all projects will be designed to avoid or minimize adverse effects upon cultural resources, including the historic scene and significant cultural landscapes. Systematic monitoring of indirect and cumulative impacts upon cultural resources—and mitigation of such impacts—will be supervised by appropriate regional or riverways staff.

Riverways staff, concessioners, and holders of special use permits will receive regular orientation to historic preservation laws, to relevant NPS policies and guidelines, and to the types of cultural resources.

Cultural resources will be vigilantly maintained and protected to prevent alteration or loss before the full implementation of this plan. Further studies and specific plans will be programmed and prepared as recommended in the "Future Studies" section of this document.

Compliance with section 106 of the National Historic Preservation Act of 1966 (16 USC 470, as amended by PL 96-515) and the regulations in "Protection of Historical and Cultural Properties" (36 CFR 800) will be accomplished for all actions detailed in this plan in accordance with the programmatic memorandum of

agreement between the National Park Service, Advisory Council on Historic Preservation, and the National Conference of State Historic Preservation Officers. All actions taken pursuant to this plan must be certified as consistent with NPS policies, directives, and guidelines by the regional cultural resource professionals. Informational copies of the form entitled "Assessment of Actions Having an Effect on Cultural Resources" (January 1980), which will be utilized during this regional certification, will be provided to the Missouri State historic preservation officer.

Archeological Resources

Management of archeological resources—both historic and prehistoric—will continue in accordance with NPS policies and guidelines. Prior to ground disturbance, the affected area will be examined by professional archeologists to identify and evaluate archeological sites. If adverse effects upon archeological resources cannot be avoided or otherwise mitigated professional retrieval of data will be accomplished by controlled surface collections, excavations, or other means acceptable to the NPS regional cultural resources personnel. The standards detailed in the NPS "Cultural Resource Management Guideline" will apply to all archeological research. Data recovery will be programmed in timely advance of construction starts (a minimum of one fiscal year is recommended).

An archeological resources preservation guide (to become part of the cultural resources preservation guide) will be prepared. The guide will include (1) a list of research problems currently recognized in the Ozark region and a general research design for the riverways; (2) a summary and assessment of present knowledge, with recommendations for future research; and (3) an analysis of special problems affecting archeological resources in

the riverways, with suggested corrective measures (e.g., impact monitoring, staff training, fencing, interpretation, data recovery).

Specific management recommendations will be given for all known archeological sites.

Historic Structures

Proposals for the treatment of historic structures will include preservation (maintaining the existing form and material of a structure), stabilization (reestablishing structural stability), adaptive use, neglect, and removal.

Modern additions (e.g., security equipment, lightning protection, fire detection and suppression, handicapped access) will be permitted in selected structures, provided that these additions can be concealed and do not damage significant original fabric.

Preservation maintenance of the Alley Spring roller mill will be guided by a proposed historic structure preservation guide, whereas treatment of other structures will follow the proposed cultural resources preservation guide. Pending completion of these guides, maintenance will be guided by the standards in the "Cultural Resource Management Guideline" and supervised by the NPS regional historical architect.

The Alley Spring roller mill will be stabilized and preserved in accordance with the "Historic Structure Report" and a proposed historic structure preservation guide. The concession operation will be removed, some interpretive exhibits will be relocated to a proposed visitor contact facility, and nonhistoric intrusions will be removed or minimized, as possible. The milling demonstration will continue. Some original machinery may be installed, and an

operating plan (visitor circulation, capacity, etc.) will be developed in accordance with addenda to the report and a proposed historic furnishings report.

Cultural Cyclic Maintenance Program funds will be programmed for preservation treatment.

The carrying capacities of selected historic resources will be professionally determined, and visitation or other use will be limited by this capacity.

Major alteration, neglect, or removal of structures over 50 years of age will require prior review by NPS regional cultural resource personnel, approval by the regional director, and concurrence of the associate director, Management and Operations, Washington, D.C.

The Lower Parker school and Nichols cabin will be allowed to deteriorate. Welch Cave hospital will receive preservation maintenance; the nonhistoric (intrusive) window bars of the hospital will be removed. The hospital ruins will be interpreted by a wayside exhibit.

The Maggard cabin will have previously removed original fabric (pinned rafters) reinstalled and will be interpreted by a wayside exhibit. Additional historical research may contribute to the interpretive story. Preservation maintenance will be provided.

Mt. Zion church will be adaptively used. Preservation maintenance of the church and of the Pulltite cabin will follow the guide.

The Round Spring store will continue to be adaptively used for maintenance storage.

Appendix I

Living history interpretation will continue in the Storys Creek school, and it will receive preservation maintenance.

At the Chilton-Williams farm complex, the Chilton house will be stabilized and preserved. The other structures will be neglected (allowed to deteriorate) following regional and Washington review and recordation. Some removal of hazardous elements may be necessary for public safety. Visitors will be alerted to the potential hazards associated with the deteriorating structures. Similarly, the Buttin school and Macy cabin will be neglected.

Development

The management objective for development is to ensure that park developments are visually compatible with each other and with the natural environment and that facilities are located in environmentally compatible areas.

It is also the purpose of management to minimize the adverse effects of flooding on the riverways' developments through thoughtful planning and designing of facilities.

Cultural Resources

Cultural resource management objectives are to preserve and protect the archeological and historic resources of the Ozarks and to foster public awareness and appreciation for the unique heritage of the region.

The continuation of historical and archeological research is directed toward acquiring additional knowledge and understanding of existing and future cultural resources.

Special attention for cultural resources is given to implement a

cultural resource maintenance program so as to reduce the adverse effects of structural deterioration caused by natural or man-made agents and to monitor construction projects to minimize irreversible impacts on potential archeological sites.

COOPERATION

Cooperation with other federal, state, and local agencies, private organizations, and members of the public will ensure that land uses in the park vicinity are compatible with long-term perpetuation of the riverways' natural, cultural, and recreational values; will develop coordinated regional programs for informing visitors of the availability of recreational opportunities and visitor services in the riverways and its vicinity; and will coordinate the development of recreational and visitor service facilities in the riverways and surrounding region.

The National Park Service will cooperate with the state of Missouri in developing programs for managing wildlife habitats, in regulating the harvesting and taking of wildlife, and in managing highway access to the riverways.

The National Park Service will also cooperate with private developers and local governmental agencies to ensure that municipal sewage treatment, solid waste disposal, industrial development, and other activities are implemented in a manner that does not adversely affect the riverways' groundwater and does not increase flooding and sedimentation or impact water quality in the riverways' surface aquatic resources.

The National Park Service will work with private interests providing canoe rental and related services to give visitors a broad range of river-oriented recreational opportunities and high quality recreational experiences.

APPENDIX J — MANAGEMENT POLICIES, U.S. DEPARTMENT OF INTERIOR, NATIONAL PARK SERVICE, 1988

[Chapter 4:12 - 4:13]

Nonnative plants and animals will not be introduced into natural zones except in rare cases where they are the nearest living relatives of extirpated native species, where they are improved varieties of native species that cannot survive current environmental conditions, where they may be used to control established exotic species, or when directed by law or expressed legislative intent.

In cultural zones, nonnative plant and animal species may be introduced in rare cases as described for natural zones. In addition, nonnative species that are a desirable part of the historic scene being represented in a cultural zone may be introduced, but only if they are controlled by such means as cultivating for plants or tethering, herding, or pasturing for animals. In such cases the exotics used must be those which are known either to have existed in the park during its period of historical significance or to have been commonly used in the local area at that time, except in cases where agricultural permits allow other crops.

In park development and special use zones (particularly landscape subzones), exotic species of plants and animals may be introduced to carry out NPS programs consistent with park objectives only when all the following conditions exist:

> Available native species will not meet the needs of the management program.
>
> Based on scientific advice from appropriate federal, state, local, and nongovernmental sources, the exotic species will not become a pest.

Such introductions will not spread and disrupt desirable adjacent natural plant and animal communities and associations, particularly those of natural zones.

The exotic species chosen should be superior in maintainability.

(See Basic Management Concepts 4:1, Fisheries Management 4:7, Genetic Resources 4:10. Pests 4:13, Agricultural Uses 8:14)

Management of Exotic Species Already Present. Management of populations of exotic plant and animal species, up to and including eradication, will be undertaken wherever such species threaten park resources or public health and when control is prudent and feasible. Examples of threatening situations include

posing a public health hazard as determined by the Centers for Disease Control or a hazard to public safety

disrupting the accurate presentation of historic scene

damaging historic or archeological resources

interfering with natural processes and the perpetuation of natural features or native species (especially those that are endangered, threatened, or otherwise unique)

significantly hampering the management of park or adjacent lands

High priority will be given to the management of exotic species that have a substantial impact on park resources and that can reasonably be expected to be successfully controlled; lower priority will be given to exotic species that have almost no impact

on park resources or that probably cannot be successfully controlled. The decision to initiate a management program will be based on existing, and where necessary newly acquired, scientific information that identifies the exotic status of the species, demonstrates its impact on park resources, and indicates alternative management methods and their probabilities of success. A management plan will be developed and implemented according to established planning procedures and will include provisions for public review and comment, where appropriate. Care will be taken that programs to manage exotic species do not result in significant damage to native species, natural ecological communities, natural ecological processes, or historic objects.

In national recreation areas and preserves where the enhancement of fish and game species for hunting and fishing is authorized, preference will be given to enhancing native species. However, where stocking of exotic fish and game species has historically occurred, stocking for the same species may be continued unless it is known to be damaging native resources.

(See Fisheries Management 4:7)

Pests

Pest Management. Pests are animal or plant populations that interfere with the purposes of the park. Strategies for managing pest populations will be influenced by whether the pest is an exotic or native species. Many fungi, insects, rodents, diseases, and other species that may be perceived as pests are native plants and animals existing under natural conditions as natural elements of the ecosystem. Also, native species pests that were evident in historic, pesticide-free times are traditional elements in cultural settings. Native pests will be allowed to function unimpeded except where control is desirable

to prevent the loss of the host or host-dependent species from the ecosystem

to prevent outbreaks of the pest from spreading to forests, trees, other plant communities, or animal populations outside the park

to conserve threatened, endangered, or unique plant specimens or communities

to preserve, maintain, or restore the historical integrity of cultural resources

to conserve and protect plants and animals in developed zones

to manage a human health hazard as defined by the Centers for Disease Control or to protect against significant threat to public safety

Proposed pest control measures must be included in an approved resource management plan.

Under an approved resource management plan, a concerted effort may be made to prolong the life of any historically significant tree, grove, woodland, forest, or other plant community existing at or representative of the time of the event commemorated.

Exotic plant and animal pests will be controlled according to provisions of the exotic species policy, stated above.

(See Planning for Natural Resource Management 4:2, Genetic Resources 4:10, Exotic Plants and Animals 4:11)

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Integrated Pest Management Procedures. Integrated pest management (IPM) procedures will be used to determine when to control pests and whether to use mechanical, physical, chemical, cultural, or biological means. Integrated pest management is the coordinated use of pest and environmental information with available pest control methods to prevent unacceptable levels of pest damage by the most economical means and with the least possible hazard to people, property, and the environment.

APPENDIX K — 5 U.S.C. § 706

§ 706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the

whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX L — WILD FREE-ROAMING HORSES AND BURROS ACT OF 1971, SECTION 1, 16 U.S.C. § 1331

§ 1331. Congressional findings and declaration of policy

Congress finds and declares that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American People; . . . .

APPENDIX M — CULTURAL RESOURCE MANAGEMENT, 1988 NATIONAL PARK SERVICE, MANAGEMENT POLICIES

[Chapter 5:1 - 5:5]

5 Cultural Resource Management

The National Park Service will preserve and foster appreciation of the cultural resources in its custody through appropriate programs of research, treatment, protection, and interpretation.

All NPS programs affecting cultural resources are subject to the provisions of the National Historic Preservation Act (16 USC 470 et seq.), the National Environmental Policy Act (42 USC 4371 et seq.), the American Indian Religious Freedom Act (42 USC 1996), the Advisory Council on Historic Preservation's regulations regarding "Protection of Historic Properties" (36 CFR 800), the Secretary of the Interior's "Standards and Guidelines for Archeology and Historic Preservation" (FR 48:44716-40), and "Federal Agency Responsibilities under Section 110 of the National Historic Preservation Act" (FR 53:472746). Other applicable legislation and regulations and specific management procedures are detailed in the *Cultural Resources Management Guideline* (NPS-28).

RESOURCE IDENTIFICATION, EVALUATION, AND REGISTRATION

The National Park Service will identify and evaluate the cultural resources of each park as required parts of the park's information base. The resulting inventories will provide the substantive data for nominating resources to the National Register of Historic Places; for general park planning and specific cultural resource management proposals; for land acquisition, development,

interpretation, and maintenance activities; and for compliance with legal requirements.

(See Information Base 2:5)

Inventories

The following cultural resource inventories will be maintained for the national park system: (1) a List of Classified Structures encompassing historic and prehistoric structures; (2) a Cultural Sites Inventory consisting of both prehistoric/historic archeological resources and ethnographic resources (cultural and natural) associated with contemporary native Americans and other ethnic groups; and (3) a National Catalog of Museum Objects encompassing all cultural and natural history objects in NPS collections.

(See Information Base 2:5, Museum Objects and Library Materials 5:9, Ethnographic Research and Inventories 5:12)

Evaluation and Categorization

To assist in management decisions about the treatment and use of cultural resources, all resources will be professionally evaluated and categorized according to criteria of significance established by the National Park Service and listed in the *Cultural Resources Management Guideline.*

National Register Nomination

All resources that appear to meet the criteria for the National Register of Historic Places will be nominated individually, as components of historic districts, or within multiple property

nominations. Parks significant primarily for their cultural resources are automatically entered in the National Register upon establishment, but nomination forms will still be submitted to document the qualifying features of such parks.

National Historic Landmark Designation

Resources eligible for the National Register that appear to possess national significance may qualify for national historic landmark designation if they are unrelated to the primary purposes or themes of their parks (that is, if they lie within predominantly natural or recreational parks or within cultural parks focusing on other themes). National Register forms documenting the case for possible landmark designation will be submitted for such resources.

World Heritage Site Designation

Cultural properties believed to possess international significance may be nominated to the World Heritage List. Inclusion in the Indicative Inventory of Potential U.S. World Heritage Nominations will be a prerequisite for nomination. U.S. recommendations are approved by an interagency panel chaired by the Assistant Secretary for Fish and Wildlife and Parks, based on criteria promulgated by the World Heritage Committee. These criteria and the rules for U.S. participation in the Convention Concerning the World Cultural and Natural Heritage are published in 36 CFR 73.

(*See World Heritage Sites 4:5*)

RESEARCH

The National Park Service will conduct a coordinated program of

basic and applied research to support planning for and management of park cultural resources. The principal goals of such mission-oriented research will be

to ensure a systematic and fully adequate park information base to identify and evaluate cultural resources

to develop appropriate technologies and methods for monitoring, treating, and protecting cultural resources

to ensure accurate treatment and interpretation of cultural resources employing the best current scholarship

to develop ethnographically appropriate approaches to conserving park cultural and natural resources

Adequate research to support planning and legal compliance will precede any final decisions about the preservation or treatment of cultural resources or about park development or operational activities that might affect cultural resources. Research needs will be identified and justified in an approved park resource management plan.

Execution of research will be preceded by approved documentation of the work to be performed. The documentation will address the relationship of the research to management objectives; the theoretical orientation and methodology of the research; how data will be recorded, ensuring confidentiality when warranted; the dissemination of results; the preservation of physically affected resources, including data recovery; and the cataloging of collections.

All research, whether conducted by NPS personnel, contractors, cooperative researchers, or independent researchers, will conform

to current standards of scholarship. It will be administered and conducted only by fully qualified personnel. The Park Service will support its research personnel in maintaining and improving their disciplinary knowledge and skills.

The data and knowledge acquired through research will be made widely available within and outside the National Park Service through such media as professional and technical reports, professional journals, popular publications, exhibits, and audiovisual productions. The status of current research and significant findings will be publicized through workshops, seminars, conferences, journal articles, and the news media. Certain research data may be withheld from public disclosure to protect sensitive archeological, historic, or ethnographic resources. The National Park Service will maintain a centralized cultural resource management bibliography of all research reports and planning documents addressing park cultural resources.

(*See Information Base 2:5, Science and Research 4:2, Planning and Proposal Formulation 5:4, Library Materials 5:11, Ethnographic Research and Inventories 5:12, Consultation and Confidentiality 5:12, Confidentiality of Resource Data 5:13*)

Cooperative and Independent Research

The National Park Service will promote cooperative relationships with recognized educational and scientific institutions and qualified individuals, encouraging them to direct their research toward park management objectives. Where appropriate, the Park Service will affiliate its cultural resource preservation and research facilities and activities with recognized institutions. The Service will encourage and, where appropriate, support independent research pertinent to the broader contexts within which park resources exist. NPS facilities and assistance will be made

available to qualified scholars conducting NPS-authorized research as long as park operations will not be impeded or park resources impaired.

Research unrelated to NPS requirements will not be undertaken or funded by the National Park Service, but may be conducted by qualified independent investigators. The issuance of a permit for independent research involving physical intervention into the fabric of cultural resources or the collection of objects in parks will be subject to compelling evidence that the proposal is essential to significant research concerns and that the purpose of this research can be reasonably achieved only by using park resources.

All cooperative and independent research must conform to NPS policies and guidelines.

(*See Conduct of Research 4:3, Research and Collection Activities 8:15*)

Preservation of Data and Collections and Protection of Research Potential

The National Park Service will not take or allow any action that reduces the research potential of cultural resources without an appropriate level of research and documented data recovery. Because research involving physical intervention into cultural resources or removal of objects is a destructive process entailing an irretrievable commitment of the resources, research in parks will employ nondestructive methods to the maximum extent feasible.

Field data, objects, specimens, and features of structures retrieved for preservation during cultural resource research and treatment projects, together with associated records and reports, will be

managed within the park museum collection. Where practical, the features of sites and structures will be left in place.

(*See Museum Objects and Library Materials 5:9*)

CONSULTATION

Other federal agencies, state and local governments, potentially affected native American and other communities, interest groups, and entities specified by law or regulation, including state historic preservation officers and the Advisory Council on Historic Preservation, will be given opportunities to become informed about and comment on anticipated NPS actions at the earliest practicable time. The National Park Service will also encourage the continuing informal exchange of views with concerned local communities on cultural resource matters.

PLANNING AND PROPOSAL FORMULATION

Overall direction for the identification, evaluation, protection, treatment, and use of cultural resources will be provided in the basic planning document(s) for each park.

Each park with cultural resources will prepare and periodically update a cultural resource component of the park's resource management plan, defining and programming the activities required to perpetuate and provide for the public enjoyment of those resources.

Any action that might affect cultural resources will be undertaken only if it meets all the following criteria:

The action is consistent with the park's purposes and applicable NPS policies and guidelines.

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Cultural resource specialists have participated in planning, and sufficient data have been gathered to assess the probable effects.

Relevant sections of the National Historic Preservation Act have been complied with in accordance with the regulations of the Advisory Council on Historic Preservation (36 CFR 800) and the "Guidelines for Federal Responsibilities under Section 110 of the National Historic Preservation Act" (FR 53:4728).

In cases involving ethnographic resources, associated native American and other ethnic groups have been consulted, and their concerns have been taken into account.

Any action that will affect cultural resources adversely will be undertaken only if the following additional criteria are also met:

There is no reasonable alternative.

All reasonable measures to limit adverse effects will be taken, including recovery of data and salvage of materials, as appropriate.

(*See Implementation Plans 2:9, Treatment of Cultural Resources 5:5, Ethnogruphic Resources 5:11*)

TREATMENT OF CULTURAL RESOURCES

With some differences by type, cultural resources are subject to several basic treatments, including preservation as is, restoration to earlier appearances by the removal of later accretions and replacement of missing elements, and reconstruction or

reproduction to replicate absent original resources. The fundamental question of which treatments will best provide for the preservation and public enjoyment of particular cultural resources will be decided through planning. No treatment project will be undertaken unless supported by an approved proposal, plan, or report appropriate to the proposed action. The significance of the resource, its condition, its interpretive value, its research potential, and the availability of data will all be weighed in determining the appropriate treatment. The appearance and condition of the resource before treatment and changes made during treatment will be appropriately documented. Pending planning decisions, all cultural resources will be protected and preserved in their existing conditions.

As a basic principle, anything of historical appearance that the National Park Service presents to the public in a park will be either an authentic survival from the past or an accurate representation of that which formerly existed there. Reconstructions and reproductions will be clearly identified as such.

Achievement of other park purposes may sometimes conflict with and outweigh the value of cultural resource preservation. The planning process will be the vehicle for weighing conflicting objectives and deciding that a cultural resource should not be preserved. Following such a decision, significant resource data and materials will be retrieved. The resource will then be permitted to deteriorate naturally, unless its destruction or direct removal is necessary for public safety or to eliminate an unacceptable intrusion. This policy does not apply to museum objects.

Policies applicable to specific cultural resource classes follow.

(See Planning Process and Products 2:4, Planning and Proposal Formulation 5:4, Cultural Resources 6:7)

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ARCHEOLOGICAL RESOURCES

Treatment

Archeological resources will be left undisturbed unless removal of artifacts or intervention into fabric is justified by protection, research, interpretive, or development requirements. They will be preserved in a stable condition to prevent degradation and loss of research values or in-situ exhibit potential. Structures of archeological significance and recovered archeological objects are also subject to the treatment policies for structures and museum objects.

(*See Museum Objects and Library Materials 5:9*)

Archeological Data Recovery

Significant archeological data that would be lost as a result of resource treatment projects, park development, uncontrollable degradation or destruction from natural or human causes, or other activities will be recovered in accordance with appropriate research proposals.

* * *

[Chapter 5:11 - 5:12]

When an archival collection not owned by the National Park Service falls within a park's approved scope of collection statement, every reasonable effort will be made to acquire it if (1) an appropriate storage facility will be provided by the Park Service or a cooperating institution, (2) the facility will be staffed by at least one archivist, curator, librarian, or other person experienced

in caring for documentary materials, and (3) the collection will be made available to serious researchers under conditions that maximize both preservation and use and ensure security against theft and vandalism.

If the foregoing acquisition criteria cannot be met, the National Park Service will encourage transfer or donation of the collection to an appropriate local or regional repository or, in the case of a collection important to a park's administrative history, to the National Park Service History Collection at the Harpers Ferry Center.

Placement of historical documents owned by the National Park Service into repositories managed by others will be subject to the procedures concerning loans of museum property and any conditions of access or other restrictions to which the Park Service may have agreed or is bound by law.

Parks will retain notes or copies of records significant to their administrative histories when they periodically ship their official records to federal record centers.

(*See Acquisition Management and Disposition of Museum Objects 5:10*)

Library Materials

Parks and other NPS offices may establish libraries to organize, store, and make available books and other information sources serving their reference and research needs. Library collections will be properly housed and maintained, and adequate space for users will be provided. All books and other recorded informational materials acquired for reference purposes will be organized and accounted for by a standard library cataloging and classification

system, whether or not they remain physically in the library. Surplus library materials will be disposed of according to current guidelines.

Books and other library materials used in exhibits or as historic furnishings will be managed as museum objects. In addition, they may be separately cataloged and classified to facilitate access to their informational content.

(*See Research 5:2 Acquisition Managernent and Disposition of Museum Objects 5:10*)

ETHNOGRAPHIC RESOURCES

Certain contemporary native American and other communities are permitted by law, regulation, or policy to pursue customary religious, subsistence, and other cultural uses of park resources with which they are traditionally associated. Such continuing use is often essential to the survival of family, community, or regional cultural systems, including patterns of belief and economic and religious life. Recognizing that its resource protection mandate affects this human use and cultural context of park resources, the National Park Service will plan and execute programs in ways that safeguard cultural and natural resources while reflecting informed concern for the contemporary peoples and cultures traditionally associated with them.

(*See Native American Use 8:8 Subsistence 8:16*)

Ethnographic Research and Inventories

To ensure that NPS plans and actions reflect contemporary knowledge about the cultural context of sites, structures, certain natural areas, and other ethnographic resources, the National Park

Appendix M

Service will conduct appropriate cultural anthropological research in cooperation with park-associated groups. The purposes of this research will be to meet management needs for information about such groups; to develop inventories of traditional ethnographic resources associated with them; to determine the effects of their traditional ceremonial and consumptive uses of park resources; to evaluate the factors guiding their traditional systems for managing natural resources and creating cultural properties; to define their traditional and contemporary relationships to these resources; and to assess the effects of NPS activities on these groups. Research findings will be used to support planning, resource management decisions, and activities; to develop interpretive programs accurately reflecting native American and other cultures; and to facilitate consultation with and meet management responsibilities to park-associated communities.

(See Park Planning Process and Products 2:4, Park Planning in a Regional Context 2:9, Inventories 5:1, Research 5:2, Interpretation and Native Americans 7:5, Native American Use 8:8)

Consultation and Confidentiality

The fundamental relationships that often exist between park resources and the integrity of contemporary native American and other cultures necessitate that the National Park Service consult with affected communities before reaching decisions about the treatment of traditionally associated resources. The identities of community consultants and information about sacred and other culturally sensitive places and practices will be kept confidential when research agreements or other circumstances warrant. The research use of community consultants or respondents will be subject to their informed consent.

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(See Research 5:2, Confidentiality of Research Data 5:13)

SUBMERGED CULTURAL RESOURCES

The National Park Service will identify, evaluate, register, monitor, and protect the submerged cultural resources in its custody. Each park with submerged cultural resources will develop a program to protect them and to provide for their interpretation to the public.

Submerged cultural resources will be left in place unless removal of artifacts or intervention into fabric is compellingly justified by overriding protection, research, or interpretive requirements. No submerged cultural resource will be removed if its preservation would be adversely affected or unless provision has been made for its appropriate conservation and curation. All such resources collected from park waters will be managed within NPS museum collections. The National Park Service will not permit treasure hunting or salvage activities at or around shipwrecks or other submerged resources.

Programs will be conducted to enhance public understanding of submerged cultural resources. Parks may provide recreational diving access to submerged resources not susceptible to damage or the removal of artifacts from such access.

The National Park Service will take care to ensure that activities by other agencies in coastal areas or along major rivers do not inadvertently impact submerged park cultural resources.

Supreme Court, U.S.
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No. 93-636

In the Supreme Court of the United States

OCTOBER TERM, 1993

RICHARD WILKINS AND ROLAND SMOTHERMAN,
PETITIONERS

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly sustained the decision of the National Park Service to remove feral horses from the Ozark National Scenic Riverways.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-636

RICHARD WILKINS AND ROLAND SMOTHERMAN,
PETITIONERS

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-15a) is reported at 995 F.2d 850. The opinion of the district court (Pet. App. 16a-32a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1993. A petition for rehearing was denied on July 28, 1993. Pet. App. 1a. The petition for a writ of certiorari was filed on October 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 6 of the Ozark National Scenic Riverways Act, Pub. L. No. 88-492, 78 Stat. 608, as amended, 16 U.S.C. 460m-5, states:

> The Ozark National Scenic Riverways shall be administered in accordance with the provisions of [the National Park Service Organic Act of August 25, 1916 (39 Stat. 535 [16 U.S.C. 1, 2-4])], as amended and supplemented, and in accordance with other laws of general application relating to the areas administered and supervised by the Secretary [of the Interior] through the National Park Service; except that authority otherwise available to the Secretary for the conservation and management of natural resources may be utilized to the extent he finds such authority will further the purposes of this Subchapter.

Section 3 of the National Park Service Organic Act of August 25, 1916, 39 Stat. 535, as amended, 16 U.S.C. 3, authorizes the Secretary of the Interior to

> provide in his discretion for the destruction of such animals and of such plant life as may be detrimental to the use of any of said [national] parks, monuments, or reservations.

STATEMENT

1. The Ozark National Scenic Riverways is a National Park occupying a 140-mile strip along the Current and Jacks Fork Rivers in Missouri. Pet. App. 3a. In recent years, approximately 20 horses have freely roamed a 24-mile stretch of the Riverways. These feral horses are believed to be descended from domestic livestock, which escaped from, or were

released by, their owners during the 1940s or 1950s, "before 'open range' ended in Missouri." Pet. App. 20a. In 1985, the Riverways staff of the Park Service prepared a study entitled "Status and Proposed Management of Feral Horse Population." C.A. App. 60-65. The study noted that one horse had been shot by an unknown person in 1982, that crops planted in the Riverways area had been damaged or destroyed by the horses, that the horses had made riverside trails bare and vulnerable to erosion, and that the horses' contact with park visitors posed risks of injury. The study accordingly recommended live trapping and removal of the horses. *Id.* at 64. Thereafter, the Park Service conducted studies and aerial surveys in 1985, 1989 and 1990 "to show the impact the wild horses had on the native fauna and plant communities in the park." Pet. App. 3a.

2. On May 3, 1990, Arthur Sullivan, the Superintendent of the Riverways park, issued a news release (Pet. App. 33a-34a), announcing that the Riverways' staff had been prompted by the concerns of "many area residents" to take steps to protect the horses. The statement noted that the horses had been found to be "ill-equipped to contend with the harsh winters, disease, injury, food shortages and other environmental factors detrimental to their continued well-being," and that there had been "numerous reports of harassment and even shootings" of the horses. The Superintendent observed that "the fact that a larger population [of horses] does not exist bears mute testimony to the extremely high mortality rate." *Id.* at 33a. He also stated that the Riverways staff would consider proposals to remove the horses from the

park or "any reasonable solution to this problem." *Id.* at 34a.

Ensuing protests by neighboring residents (Pet. App. 4a), as well as inquiry from United States Representative Bill Emerson (*id.* at 30a-31a), led to a "thorough review" of the issue by the Park Service. *Id.* at 35a. On February 20, 1991, Acting Assistant Secretary of the Interior Sewell sent Representative Emerson a letter reaffirming the Interior Department's decision to begin removing the horses. *Id.* at 35a-37a. Superintendent Sullivan ultimately selected a plan providing for removal of the horses, and the National Park Service issued a special use permit to a private individual to carry out the plan. C.A. App. 7-8.

3. In February 1991, the National Park Service released an environmental assessment (EA), entitled "Removal of Feral Horses," C.A. App. 39, which summarized past events and studies regarding the horses, *id.* at 44-45, and assessed the alternative solutions to the problem. The removal alternative, known as "Alternative II," was eventually identified as the preferred course.[1] On March 20, 1991, the Regional Director of the National Park Service's Midwest Region made a finding of no significant environmental impact (FONSI) regarding proposed Alternative II, and concluded that no environmental impact statement needed to be prepared before the horses were removed. *Id.* at 40.[2]

[1] The three rejected alternatives were no action, sterilization, and eradication.

[2] Environmental impact statements are described in Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). Environmental assessments and FONSIs are described in regulations of the Council on

4. On February 26, 1991, a group of local citizens filed this action against the Secretary of the Interior, Superintendent Sullivan, and the Park Service's permittee, seeking a permanent injunction against removal of the horses. See C.A. App. 9-14.[3] The complaint alleged that the feral horses had unique historic and scenic importance to the area, and that their removal would cause plaintiffs irreparable harm because the residents would "no longer be able to enjoy the horses as before." *Id.* at 13, 10. The complaint also alleged that removal or destruction of the horses "would violate the enabling statute for the Ozark National Scenic Riverways." *Id.* at 13.

Following a trial on the merits, the district court permanently enjoined removal of the horses. Pet. App. 16a. The court held that review of the Park Service's decision was governed by the "arbitrary and capricious" standard of the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A). Pet. App. 25a-26a. The court acknowledged that the Secretary of the Interior has authority, under Section 3 of the National Park Service Organic Act of 1916, 16 U.S.C. 3, to destroy or remove the horses if they are "detrimental to the Riverways." Pet. App. 26a-29a. The court also acknowledged that the horses "technically" comprise a species that is exotic to the Riverways area, *id.* at 27a, and that it was the Park Service's announced policy to manage exotic species "up to and including

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Environmental Quality, 40 C.F.R. 1501.7(a)(5), 1508.9, 1508.13. The complaint alleged no violation of NEPA or any NEPA regulation.

[3] The district court entered a temporary restraining order on the day the complaint was filed. *Id.* at 15.

eradication" when "such species threaten park resources or public health" and when "control is prudent and feasible." *Ibid.*

The district court nevertheless set aside the Park Service's decision to remove the horses, concluding that the evidence did not establish that the horses were detrimental to the use of the Riverways Park or that they presented any threat to park resources. Pet. App. 29a. The court discounted as "exaggerated" (*ibid.*) the Park Service's decision documents, exhibits, and evidence showing that the horses posed a threat to resources in the Riverways. The district court also concluded that the Park Service decision was flawed because the Service "failed to consider relevant facts as to whether the horses are a cultural or historical resource" within the meaning of Section 1 of the 1916 Organic Act, 16 U.S.C. 1, or Section 1 of the 1964 Enabling Act, 16 U.S.C. 460m. Pet. App. 30a-32a.

5. a. The court of appeals reversed, with one judge dissenting. Pet. App. 2a-15a. The panel majority held that "[t]he Secretary's decision was an informal agency decision for which the standard of review is to determine if the agency decision was arbitrary and capricious." *Id.* at 6a. The court then held that the district court had improperly applied this standard of review and had impermissibly relied on its own factual findings rather than on the administrative record underlying the Secretary's decision. *Ibid.* The court of appeals found that the administrative record contained sufficient evidence to support the Secretary's decision to remove the horses under the authority granted to him by the 1916 Organic Act. *Id.* at 7a. Specifically, it noted that studies showed that

the horses had trampled 40 to 60 acres of planted crops on lands rented to farmers, posed a threat to native plants, competed directly with native wildlife for forage, and made extensive trails that had, in turn, caused erosion problems. The court concluded that "the Secretary need not wait for further damage to the park before taking action." *Id.* at 7a.

b. In his dissent, Judge Loken objected to the majority's failure to specify which document constituted the final agency decision, noting that the Park Superintendent testified in a deposition that his "decision document" was the May 1990 press release, and not the February 1991 letter to Congressman Emerson. See Pet. App. 9a. Judge Loken also stated that Superintendent Sullivan was wrong in what Judge Loken understood to be the Superintendent's belief that "he was required to remove the horses without any evidence of detrimental impact." *Id.* at 12a. Finally, Judge Loken concluded that there was not adequate evidence in the record of a detrimental impact. *Id.* at 12a-14a. Judge Loken agreed, however, with the majority's decision to vacate the permanent injunction, "because it improperly precludes the agency from revisiting this issue in the future." *Id.* at 15a n.4.

ARGUMENT

Contrary to petitioners' arguments, the court of appeals properly sustained the Secretary's decision to remove the feral horses. Petitioners' case-specific, factual challenges to the court of appeals' decision do not warrant this Court's review.

1. Petitioners contend (Pet. 8-9) that the court of appeals erred in not specifying which document

represented the final agency decision to remove the horses, and in engaging in "post-hoc rationalization" by relying on material accumulated after the agency decision was made. This argument is without merit. Petitioners concede that the decision to remove the feral horses was taken between May 1990 and February 1991. Pet. 8. The court of appeals devoted its decision to reviewing the ample evidence of the horses' destructive potential that had been amassed by the Park Service prior to the 1990 press release.[4] See Pet. App. 3a (noting studies in 1985, 1989 and 1990), 6a-7a (reciting facts from 1985 study). The court of appeals did not indicate that it relied on the 1991 EA or on any other material gathered by the Park Service after May 1990 in upholding the Park Service's decision to remove the horses.[5] Within the pre-1990 record, the court of appeals found sufficient basis for concluding that the agency's action was not arbitrary or capricious. Pet. App. 7a. Thus, even if the May 1990 press release by the Park Superintendent constituted the agency's final decision, this is not a case in which the court upheld the agency's decision on grounds different from those "upon which

[4] Although the Riverways Superintendent regarded his May 1990 press release as his written decision to remove the horses (C.A. App. 215), local objection subsequently led to a thorough review of the issue and forestalled implementation of final action until the 1991 letter to Representative Emerson confirmed that the horses would be removed. Pet. App. 35a. Another point of decision occurred when the agency selected the individual who would conduct the removal and issued him a special use permit.

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the record discloses that [the agency's] action was based." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943).[6] In any event, the matter thereafter was thoroughly reviewed, and a fresh determination was made at a higher level in the Interior Department, as explained in the February 20, 1991, letter from the Acting Assistant Secretary. See note 4, *supra*.

2. Petitioners also complain (Pet. 8-9) that, because the Park Service failed to identify the precise point in time that it decided to remove the horses, the reviewing court could not know whether the agency decision was based on what petitioners assert was the Park Superintendent's perception that the agency was "under a legal mandate" to remove the horses (see Pet. 8), or whether the decision was a permissible (but not mandatory) exercise of agency discretion. Contrary to petitioners' assertion, neither the May 1990 press release nor the February 1991 letter

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[6] In response to the public's expression of concern, and in spite of the sufficiency of the evidence supporting the 1990 document, the agency chose to conduct an environmental assessment even though none was required. Under Department of the Interior regulations implementing NEPA, environmental assessments are required on "all actions, except those covered by a categorical exclusion." A categorical exclusion exists for the "elimination of exotic species" from a national park. Department of the Interior, Departmental Manual, 516 DM 7, App. 7.4E(6) (1985). "Notwithstanding the [categorical] exclusions * * *, a responsible Departmental or Bureau official may decide to prepare an environmental document." 516 DM 2.3A(4) (1984). Voluntary environmental assessments may be conducted "at any time in order to assist in planning and decisionmaking." 516 DM 3.2B (1984). In this case, the environmental assessment provided a summary of past events and studies regarding the horses.

states that removal of the horses was "mandated" by law, in the sense that the applicable statute left no room for the exercise of judgment by the agency on the basis of an assessment of the factual circumstances. Petitioners' argument turns on subsequent deposition testimony by the Superintendent that, in context, merely describes the application of Park Service policies in the particular context of the feral horses in the Riverways. See Pet. 5-6.

Moreover, it is beside the point whether the agency's action was based on a discretionary judgment that removing the horses was the best course of action, or on a perception that the action was effectively "mandated" under the relevant statute and regulations in light of the environmental studies previously conducted on the horses; the decision to remove the horses would be valid in either event. Park Service regulations explicitly forbid allowing "livestock of any kind" to run at large in a National Park in the absence of contrary statutory requirements, deed reservations, or a Park Service determination that such use of livestock is a "necessary and integral" part of recreation or is "required" to "maintain a historic scene." See 36 C.F.R. 2.60(a) and C.A. App. 45, 63, 76. No statute, regulation, deed reservation, or other provision requires retention of the horses in the Riverways.

In addition, Park Service policy governing exotic species in fact does mandate their removal from National Parks under specified conditions. The exotic horses at issue in this case roam primarily in areas of the Riverways designated as "natural zones." Pet. App. 27a-29a. Under the 1988 Management Policies of the Park Service, the introduction of exotic

species into "natural zones" is generally forbidden. *Id.* at 65a. The same Management Policies *require* that exotic species be managed, up to and including eradication, whenever they "threaten park resources and public health" and whenever such "control is prudent and feasible." *Id.* at 66a. The 1985 feral horse study (C.A. App. 60, 62-63), as well as the 1991 environmental assessment (*id.* at 39, 45-47, 52), concluded that the horses do "threaten" park resources within the meaning of the 1988 Management Policies governing exotic species (*id.* at 46, 52-53, 63).

Thus, any assumption that removal of the horses was effectively required under applicable law would have been proper. *A fortiori*, the record amply supports any discretionary decision by the agency to remove the horses. To the extent the agency had the statutory authority, based on facts in the record, to remove the horses, it does not matter whether the agency perceived its decision as discretionary or mandatory. In either case, the facts in the record "surely indicated the determinative reason for the final action taken." *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973).

3. Petitioners also fault the Park Service for failing to consider whether the horses qualified as "cultural resources" warranting protection and preservation. See Pet. 10-15. Contrary to petitioners' assertion, however, the agency did not arbitrarily fail to consider the importance of the horses as a cultural and historic resource, because the agency's experience did not indicate that there was a need to consider that factor. A survey and extensive discussion of the cultural resources of the Riverways was included in the widely distributed 1982 General

Management Plan for the Riverways (Pet. App. 52a-55a); the Park Service received no comments on that Plan suggesting that the horses should be considered a cultural resource. See also *id.* at 56a-64a. Moreover, the horses were never characterized as historic or cultural resources in studies of the Riverways' resources conducted in compliance with the National Historic Preservation Act, 16 U.S.C. 470. See Pet. App. 59a.[7] Finally, petitioners do not point to any statutes that would elevate the horses to a "historic or cultural resource;" rather, petitioners simply assert (Pet. 13) that residents and neighbors of the Park consider the horses "a part of their heritage." In light of the failure of experts and the public to identify the horses as a true cultural resource of the Riverways, the absence of any mention of that factor by the agency when it decided to remove the horses was not arbitrary and capricious.[8]

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[7] The Riverways Superintendent, Art Sullivan, testified (C.A. App. 226-227) that the feral horses were not included in any prior inventories undertaken by historians and archaeologists to identify the cultural resources of the Riverways. Moreover, in prior public meetings on the Park Service's general management plan for the Riverways, Mr. Sullivan could recall no members of the public recommending that the horses be considered a cultural or historic resource of the Riverways. *Id.* at 230.

[8] Nor is an exotic species, recently introduced into a national *park*, the kind of cultural resource Congress sought to protect in the Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. 1331, upon which petitioners rely (Pet. 13). That act allows foraging by horses on certain lands administered by the Forest Service and the Bureau of Land Management, but it has no application to lands managed by the National Park Service. See 16 U.S.C. 1332(b) and (e).

In sum, the court of appeals correctly determined that the agency had "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Electric Co.* v. *NRDC*, 462 U.S. 87, 105 (1983). Based on the agency's documentation of the damage caused by the horses and the likelihood of future harm to the Park, the court correctly upheld the decision to remove the horses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
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LOIS J. SCHIFFER
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Attorneys

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QUESTION PRESENTED

Whether the court of appeals properly sustained the decision of the National Park Service to remove feral horses from the Ozark National Scenic Riverways.

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STATEMENT

1. The Ozark National Scenic Riverways is a National Park occupying a 140-mile strip along the Current and Jacks Fork Rivers in Missouri. Pet. App. 3a. In recent years, approximately 20 horses have freely roamed a 24-mile stretch of the Riverways. These feral horses are believed to be descended from domestic livestock, which escaped from, or were

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Ensuing protests by neighboring residents (Pet. App. 4a), as well as inquiry from United States Representative Bill Emerson (*id.* at 30a-31a), led to a "thorough review" of the issue by the Park Service. *Id.* at 35a. On February 20, 1991, Acting Assistant Secretary of the Interior Sewell sent Representative Emerson a letter reaffirming the Interior Department's decision to begin removing the horses. *Id.* at 35a-37a. Superintendent Sullivan ultimately selected a plan providing for removal of the horses, and the National Park Service issued a special use permit to a private individual to carry out the plan. C.A. App. 7-8.

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2. Petitioners also complain (Pet. 8-9) that, because the Park Service failed to identify the precise point in time that it decided to remove the horses, the reviewing court could not know whether the agency decision was based on what petitioners assert was the Park Superintendent's perception that the agency was "under a legal mandate" to remove the horses (see Pet. 8), or whether the decision was a permissible (but not mandatory) exercise of agency discretion. Contrary to petitioners' assertion, neither the May 1990 press release nor the February 1991 letter

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[6] In response to the public's expression of concern, and in spite of the sufficiency of the evidence supporting the 1990 document, the agency chose to conduct an environmental assessment even though none was required. Under Department of the Interior regulations implementing NEPA, environmental assessments are required on "all actions, except those covered by a categorical exclusion." A categorical exclusion exists for the "elimination of exotic species" from a national park. Department of the Interior, Departmental Manual, 516 DM 7, App. 7.4E(6) (1985). "Notwithstanding the [categorical] exclusions * * *, a responsible Departmental or Bureau official may decide to prepare an environmental document." 516 DM 2.3A(4) (1984). Voluntary environmental assessments may be conducted "at any time in order to assist in planning and decisionmaking." 516 DM 3.2B (1984). In this case, the environmental assessment provided a summary of past events and studies regarding the horses.

states that removal of the horses was "mandated" by law, in the sense that the applicable statute left no room for the exercise of judgment by the agency on the basis of an assessment of the factual circumstances. Petitioners' argument turns on subsequent deposition testimony by the Superintendent that, in context, merely describes the application of Park Service policies in the particular context of the feral horses in the Riverways. See Pet. 5-6.

Moreover, it is beside the point whether the agency's action was based on a discretionary judgment that removing the horses was the best course of action, or on a perception that the action was effectively "mandated" under the relevant statute and regulations in light of the environmental studies previously conducted on the horses; the decision to remove the horses would be valid in either event. Park Service regulations explicitly forbid allowing "livestock of any kind" to run at large in a National Park in the absence of contrary statutory requirements, deed reservations, or a Park Service determination that such use of livestock is a "necessary and integral" part of recreation or is "required" to "maintain a historic scene." See 36 C.F.R. 2.60(a) and C.A. App. 45, 63, 76. No statute, regulation, deed reservation, or other provision requires retention of the horses in the Riverways.

In addition, Park Service policy governing exotic species in fact does mandate their removal from National Parks under specified conditions. The exotic horses at issue in this case roam primarily in areas of the Riverways designated as "natural zones." Pet. App. 27a-29a. Under the 1988 Management Policies of the Park Service, the introduction of exotic

species into "natural zones" is generally forbidden. *Id.* at 65a. The same Management Policies *require* that exotic species be managed, up to and including eradication, whenever they "threaten park resources and public health" and whenever such "control is prudent and feasible." *Id.* at 66a. The 1985 feral horse study (C.A. App. 60, 62-63), as well as the 1991 environmental assessment (*id.* at 39, 45-47, 52), concluded that the horses do "threaten" park resources within the meaning of the 1988 Management Policies governing exotic species (*id.* at 46, 52-53, 63).

Thus, any assumption that removal of the horses was effectively required under applicable law would have been proper. *A fortiori*, the record amply supports any discretionary decision by the agency to remove the horses. To the extent the agency had the statutory authority, based on facts in the record, to remove the horses, it does not matter whether the agency perceived its decision as discretionary or mandatory. In either case, the facts in the record "surely indicated the determinative reason for the final action taken." *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973).

3. Petitioners also fault the Park Service for failing to consider whether the horses qualified as "cultural resources" warranting protection and preservation. See Pet. 10-15. Contrary to petitioners' assertion, however, the agency did not arbitrarily fail to consider the importance of the horses as a cultural and historic resource, because the agency's experience did not indicate that there was a need to consider that factor. A survey and extensive discussion of the cultural resources of the Riverways was included in the widely distributed 1982 General

Management Plan for the Riverways (Pet. App. 52a-55a); the Park Service received no comments on that Plan suggesting that the horses should be considered a cultural resource. See also *id.* at 56a-64a. Moreover, the horses were never characterized as historic or cultural resources in studies of the Riverways' resources conducted in compliance with the National Historic Preservation Act, 16 U.S.C. 470. See Pet. App. 59a.[7] Finally, petitioners do not point to any statutes that would elevate the horses to a "historic or cultural resource;" rather, petitioners simply assert (Pet. 13) that residents and neighbors of the Park consider the horses "a part of their heritage." In light of the failure of experts and the public to identify the horses as a true cultural resource of the Riverways, the absence of any mention of that factor by the agency when it decided to remove the horses was not arbitrary and capricious.[8]

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[7] The Riverways Superintendent, Art Sullivan, testified (C.A. App. 226-227) that the feral horses were not included in any prior inventories undertaken by historians and archaeologists to identify the cultural resources of the Riverways. Moreover, in prior public meetings on the Park Service's general management plan for the Riverways, Mr. Sullivan could recall no members of the public recommending that the horses be considered a cultural or historic resource of the Riverways. *Id.* at 230.

[8] Nor is an exotic species, recently introduced into a national *park*, the kind of cultural resource Congress sought to protect in the Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. 1331, upon which petitioners rely (Pet.13). That act allows foraging by horses on certain lands administered by the Forest Service and the Bureau of Land Management, but it has no application to lands managed by the National Park Service. See 16 U.S.C. 1332(b) and (e).

In sum, the court of appeals correctly determined that the agency had "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Electric Co.* v. *NRDC*, 462 U.S. 87, 105 (1983). Based on the agency's documentation of the damage caused by the horses and the likelihood of future harm to the Park, the court correctly upheld the decision to remove the horses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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